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Evidence Benchbook
Updates: September 2011–January 1, 2012

Updates have been issued for the Evidence Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 2: Relevancy

2.2(D)(2)Character Evidence

- If a trial court determines that evidence of a victim's past sexual conduct is not admissible under one of the statutory exceptions provided by MCL 750.520j (rape-shield statute), it must consider whether admission is required to preserve the defendant's constitutional right to confrontation; if the evidence is not so required, the court should favor exclusion of the evidence. *People v Benton*, ___ Mich App ___ (2011).

2.2(F)(1)(c) Character Evidence

- In a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible, MCL 768.27a; a showing of similarity between the prior offense and the charged offense is unnecessary, and the length of time between the prior offense and the charged offense is irrelevant. *People v Brown (Bryan)*, ___ Mich App ___ (2011).

2.2(F)(5)(b) Character Evidence

- Although they were different from the charged offense, a defendant's prior acts of domestic violence were more probative

than prejudicial because they illustrated the nature of the defendant's relationship with the victim and provided information to assist the jury in assessing the victim's credibility. *People v Meissner*, ___ Mich App ___ (2011).

Chapter 3: Witnesses, Opinions, & Expert Testimony

3.6(F)Impeachment of Witness—Bias, Character, Prior Convictions, Prior Statements

- A declarant's statement was admissible under MRE 801(d)(1)(B) through third-party testimony because the declarant's purported motive to falsify arose after the prior consistent statement was made. *People v Mahone*, ___ Mich App ___ (2011).

3.8(A) Depositions & Interrogatories

- Effective October 4, 2011, M Civ JI 4.11 was amended to provide language for instructing a jury when a summary of a deposition is read into evidence.

3.13(B)(2) Medical Malpractice—Expert Testimony

- Although a trial court errs by waiting to establish the applicable standard of care until after the proofs have closed, such an error does not always require reversal. *Jilek v Stockson*, ___ Mich ___ (2011).

Chapter 4: Hearsay

4.3(F) Hearsay Exceptions

- MCL 768.27c, which establishes an exception to the hearsay rule for certain statements in cases involving domestic violence, directs that a hearsay statement can be admissible if, among other things, the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury, MCL 768.27c(1)(c). *People v Meissner*, ___ Mich App ___ (2011). In *Meissner*, verbal and written statements by the victim detailing threats by the defendant on previous occasions, earlier that morning, and again that same day via text message satisfied the temporal limitation described in MCL 768.27c(1)(c).

- MCL 768.27c(2) expressly states that the court is not limited to the listed factors when determining "circumstances relevant to the issue of trustworthiness;" the listed factors are merely "a

non-exclusive list of possible circumstances that may demonstrate trustworthiness." *People v Meissner,* ___ Mich App ___ (2011).

- The reference in MCL 768.27c(2)(a) to a statement made in contemplation of "pending or anticipated litigation" "does not pertain to the victim's report of the charged offense[;]" it pertains to litigation in which the declarant could gain a property, financial, or similar interest. *People v Meissner,* ___ Mich App ___ (2011).

Evidence Benchbook

Part of the original Circuit Court Benchbook

By The Honorable J. Richardson Johnson
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Ninth Judicial Circuit
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Michigan Supreme Court

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The research done on this benchbook is current through January 1, 2012. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

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- Mr. Timothy Baughman, *APA Wayne County*
- The Honorable William J. Caprathe
- The Honorable Elizabeth L. Gleicher
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Using This Benchbook

This benchbook is intended for all Michigan judges. The purpose of this benchbook is to provide a single source to address evidentiary issues that may arise while the judge is on the bench. The benchbook is designed to be a ready reference, not an academic discussion. In that context, one of the most difficult challenges is organizing the text so that the user can readily find any topic as it arises.

This book has underlying themes that may assist the user to understand the overarching concepts around which the book is organized. This book is based upon the following concepts:

- The focus is on process rather than substantive law although substantive law is discussed when important or necessary to decision making and the process as a whole.
- The text covers the routine issues that a judge may face and non-routine issues that require particular care when they arise.
- The text is designed to encourage best practices rather than minimal compliance.
- The text is intended to include the authority the judge needs to have at his or her fingertips to make a decision.
- The text is designed to be read aloud or incorporated in a written decision.

With these concepts in mind, the text is organized as follows:

- The format generally follows the sequence of the Michigan Rules of Evidence.
- The format generally follows the typical sequence in which issues arise during the course of a case.
- At the beginning of each chapter is a table of contents that lists what is covered in the chapter.
- Sections in each chapter are identified by the word or phrase typically used to identify the topic (a keyword concept).
- The discussion of each topic is designed to move from the general to the specific without undue elaboration.

- If the court is required to consider particular factors when making a decision, every effort has been made to identify the necessary elements.

- Every effort has been made to cite the relevant Michigan law using either the seminal case or the best current authority for a body of law. United States Supreme Court decisions are cited when Michigan courts are bound by that authority and they are the original source. There are references to federal decisions or decisions from other states when no applicable Michigan authority could be located.

- Every effort has been made to cite the source for each statement (if no authority is cited for a proposition, then the statement is the author's opinion or part of a committee tip).

- If a proceeding or rule of evidence is based upon a statute, reference to that authority is given in the text.

- If a model or standard jury instruction addresses an issue, it is referenced in the text.

Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the Justices of the Michigan Supreme Court.

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Chapter 1: General Matters

1.1 Evidence—Overview

The admissibility of evidence is governed by the common law, statutes, and the Michigan Rules of Evidence (MRE). See MRE 101. The rules of evidence cover the vast majority of evidentiary issues and are the beginning point for any analysis. Generally, the rules provide that evidence is admissible if relevant (MRE 402), unless excluded by another rule or constitutional provision. The exclusionary rules typically state the exclusion and then provide for exceptions to the exclusions. For example, the hearsay rule provides for the exclusion of hearsay (MRE 802) and then provides exceptions to the exclusion (MRE 803, MRE 803A, MRE 804). "[The rules of evidence] are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." MRE 102.

The rules apply to all actions and proceedings in Michigan courts, except for the actions and proceedings listed in MRE 1101(b)(1)–MRE 1101(b)(10). MRE 1101(a). When a conflict exists between a statute and a

rule of evidence, the rule of evidence "prevails if it governs purely procedural matters." *Donkers v Kovach*, 277 Mich App 366, 373 (2007). Statutory rules of evidence may apply if they do not conflict with the Michigan Rules of Evidence. MRE 101; *People v McDonald*, 201 Mich App 270, 273 (1993). In *McDonald*, the Court concluded that MCL 257.625a(7)[1] did not conflict with the rules of evidence because it did not allow admission of the evidence for the purpose of establishing guilt, and it required the court to issue a jury instruction explaining how the evidence was to be used. *McDonald, supra* at 273.

"The rules of evidence in civil actions, insofar as the same are applicable, shall govern in all criminal and quasi criminal proceedings except as otherwise provided by law." MCL 768.22(1).

Standard of Review. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278 (2003). However, if the decision involves a preliminary question of law, such as the meaning of a rule of evidence or whether a rule of evidence or statute precludes the admission of the evidence, it is reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332 (2002); *Katt, supra* at 278. "Therefore, when such preliminary questions are at issue, . . . an abuse of discretion [will be found] when a trial court admits evidence that is inadmissible as a matter of law." *Katt, supra* at 278. However, "[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113 (2001).

> "An error in the admission or exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. Under this rule, reversal is required only if the error is prejudicial. The defendant claiming error must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence." *People v McLaughlin*, 258 Mich App 635, 650 (2003) (internal citations omitted).

An appeal may not be based on an error admitting or excluding evidence unless a substantial right of a party is affected. See MRE 103(a) and MRE 103(d).

[1] This statute has been amended since *McDonald*. The citation for the section discussed in the case is now MCL 257.625a(9). The statute permits the admission of a person's refusal to submit to a chemical test for the limited purpose of showing that the test was offered to the person.

Committee Tips:

The following outline may assist with the analysis of evidentiary issues.

Test for admissibility:

- *Do the rules of evidence apply? MRE 101; MRE 1101.*
- *Has the foundation for admission been established?*
- *Is the evidence relevant as defined by MRE 401? MRE 402.*
- *Although relevant, is the evidence subject to exclusion under the balancing test of MRE 403?*
- *Although relevant, is the evidence inadmissible under one of the other rules (for example, hearsay or privilege)? If so, is there an exception to the rule of preclusion that allows admission (for example, the business record exception to the hearsay rule)?*
- *Is the evidence admissible for a limited purpose? MRE 105.*

Judicial Ruling:

- *Require attorneys to give the reason or the authority for any objections.*
- *When there is an objection, it may be helpful to ask the other attorney what the evidence is being offered to prove (i.e. how is it relevant?).*
- *Distinguish between preliminary findings of fact (to which the rules of evidence do not apply) and rulings on evidence (which are covered by the rules). Remember the rules of evidence (except those rules relating to privileges) do not apply to preliminary findings of fact. MRE 104(a) and MRE 1101(b)(1).*
- *Give the reason for your ruling even for a routine objection and decision. MRE 103.*
- *Mention discretion when the court has discretion. Discretion under MRE 403 is an example. Remember the court does not have discretion under many rules of evidence.*
- *Permit an offer of proof outside the presence of the jury, if excluding evidence. MRE 103(a)(2). See Alpha Capital Management, Inc v Rentenbach, 287 Mich App 589, 619 (2010), where the trial court imposed time limitations on witness testimony and subsequently abused its*

discretion when it refused to allow the plaintiff to submit an offer of proof showing what the plaintiff intended to prove had more time been given for witness testimony. See also Barksdale v Bert's Marketplace, 289 Mich App 652 (2010).

1.2 Motion in Limine

A motion in limine is "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial. Typically, a party makes this motion when it believes that mere mention of the evidence during trial would be highly prejudicial and could not be remedied by an instruction to disregard." Black's Law Dictionary (8th ed). Motions in limine are most commonly made before trial; however, they may also be made and decided upon during trial.

Neither the court rules nor the rules of evidence specifically provide for a motion in limine by name. However, the practice is referenced in MRE 103(a), which provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." In addition, courts have the inherent discretion to decide preliminary evidentiary questions in either a civil or criminal case, and MRE 104(a) obligates a trial court to resolve preliminary evidentiary questions by making a determination of the admissibility of evidence. In criminal cases, the motion is often a motion to suppress. However, a motion in limine may also be employed by a party seeking to *gain* admission of certain evidence, rather than suppress it.

The following table includes a list of situations where motions in limine are commonly used:

Table 1: Common Motions in Limine

Possible Use	Relevant Rule(s) of Evidence	Where to Go for Further Discussion
Privilege	MRE 501	Section 1.10
Irrelevant or unfairly prejudicial evidence	MRE 402 and MRE 403	Section 2.1
Character evidence to prove conduct	MRE 404	Section 2.2

Table 1: Common Motions in Limine

Possible Use	Relevant Rule(s) of Evidence	Where to Go for Further Discussion
Subsequent remedial efforts	MRE 407	Section 2.5
Offers to settle	MRE 408	Section 2.6
Existence of insurance	MRE 411	Section 2.10
Prior convictions	MRE 609	Section 3.6

1.3 Admissibility

A. Preliminary Question Concerning Admissibility

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [conditional relevancy requirement]. In making its determination it is not bound by the Rules of Evidence except those with respect to privileges." MRE 104(a).

B. Who Decides Specific Admissibility Questions

1. Exhibits

MRE 1008 states:

> "When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of [MRE] 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact."

2. Other Evidence

When the evidence is not the "contents of writings, recordings, or photographs," some preliminary questions are for the judge and some questions are for the jury. *People v Vega*, 413 Mich 773, 778-779 (1982), superseded by statute on other grounds as stated in *People v Barrett*, 480 Mich 125 (2008). Preliminary questions of admissibility are to be decided by the *court*. MRE 104(a). "'[P]reliminary questions of conditional relevance envisioned by [MRE] 104(b) are those which present no [] danger of prejudice to the defendant. They are questions of probative force rather than evidentiary policy. They involve questions as to the fulfillment of factual conditions which the *jury* must answer.'" *Vega, supra* at 778-779, quoting *United States v James*, 590 F2d 575, 579 (CA 5, 1979) (emphasis added).

1.4 Foundation

A. Lack of Personal Knowledge

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness'[s] own testimony. This rule is subject to the provisions of [MRE] 703, relating to opinion testimony by expert witnesses." MRE 602.

B. Requirement of Authentication or Identification

"The proper foundation for admissibility of evidence is governed by MRE 901(a), which states: 'The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *People v Jambor (Jambor I)*, 271 Mich App 1, 5 (2006), rev'd on other grounds 477 Mich 853 (2006). The proponent bears the burden of showing that a foundation has been established. *Jambor I, supra* at 5. The proponent must provide evidence sufficient to support a finding that the matter in question is what the proponent claims it is. MRE 901; *Jambor I, supra* at 5. "'Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility.'" *Id.* at 7 n 2, quoting *People v White*, 208 Mich App 126, 133 (1994).

In *Jambor I*, the prosecution sought to introduce into evidence four white fingerprint cards, one of which contained the defendant's latent fingerprint, allegedly removed from the scene of a break-in.

Jambor I, 271 Mich App at 3. The evidence technician who collected the latent print died before trial, and the prosecution attempted to authenticate the evidence by testimony from a police officer who observed the evidence technician collecting the prints at the crime scene. *Id.* at 5. However, the witness testified that he only observed the technician working with black cards, not white ones, and the prosecution could offer no explanation for the inconsistency in the colors of the cards the witness observed and the cards the prosecution sought to admit at trial. *Id*. at 5-6. The *Jambor I* Court concluded that the prosecution had failed under MRE 901 to lay a proper foundation for admitting the evidence and affirmed the trial court's order excluding it. *Jambor I, supra* at 7. The Michigan Supreme Court reversed the Court of Appeals ruling:

> "The exhibits were sufficiently authenticated as fingerprint cards relating to the offense, containing complaint number, address, signature of the preparing officer, and were referenced and described in a report prepared by the officer as confirmed by a witness whose credibility was not questioned, thereby satisfying MRE 901." *People v Jambor (Jambor II)*, 477 Mich 853 (2006).

The following examples illustrate evidence sufficient for authentication or identification purposes:

- Testimony of a witness with knowledge;
- Nonexpert opinion[2] on handwriting;
- Comparison by trier of fact or expert witness;[3]
- Distinctive characteristics and the like;
- Voice identification;
- Telephone conversations;
- Public records or reports;
- Ancient documents or data compilations;
- Process or system; and
- Methods of authentication or identification provided by statute or rule. MRE 901(b)(1)–MRE 901(b)(10).

[2] See Section 3.10 for a discussion of lay opinions.

[3] See Section 3.11 for a discussion of expert opinions.

C. Self-Authentication

The following items, found in MRE 902(1)–MRE 902(11), are considered self-authenticating and require no extrinsic evidence to prove their authenticity:

- Domestic public documents under seal.
- Domestic public documents not under seal.
- Foreign public documents.
- Certified copies of public records.
- Official publications.
- Newspapers and periodicals.
- Trade inscriptions and the like.
- Acknowledged documents.
- Commercial paper and related documents.
- Presumptions created by law.
- Certified copies of regularly conducted activity.

1.5 Judicial Notice

A. Purpose

Judicial notice is a substitute for proof. *Winekoff v Pospisil*, 384 Mich 260, 268 (1970). A court may not take judicial notice of the existence of a necessary element of an offense. *People v Taylor (Robbie)*, 176 Mich App 374, 376 (1989). In *Taylor (Robbie)*, the trial court erred when it did not require the prosecution to present evidence of its charges against the defendant (charged with being a habitual offender), but instead relied on testimony and evidence from a previous trial to make its decisions. *Taylor (Robbie), supra* at 376-378.

B. Of Adjudicative Facts

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b).[4] See also *Freed v Salas*, 286 Mich App 300, 341 (2009).

A court may take judicial notice during any stage of the proceedings. MRE 201(e). If the court takes judicial notice during a *civil* proceeding, it must "instruct the jury to accept as conclusive any fact judicially noticed." MRE 201(f). If the court takes judicial notice during a *criminal* proceeding, it must "instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." *Id.*

A trial court may take judicial notice of another court's authenticated opinion or judgment because it constitutes "prima facie evidence of all facts recited therein in any other court of this state" pursuant to MCL 600.2106. *In re Sumpter Estate*, 166 Mich App 48, 57 (1988).

C. Of Law

A court, without request by a party, may take judicial notice of the common law, constitutions, statutes, Michigan ordinances and regulations, private acts and resolutions of the United States Congress and of the Michigan Legislature, and foreign laws. MRE 202(a). However, judicial notice of these items becomes mandatory when "a party requests it and (1) furnishes the court sufficient information to enable it properly to comply with the request and (2) has given each adverse party such notice as the court may require to enable the adverse party to prepare to meet the request." MRE 202(b). Failure to judicially notice a statute under MRE 202(b) may be harmless error where "(1) the statute[] [was] admitted into evidence at trial and [was] given to the jury for its consideration, (2) the jury was correctly instructed regarding the law, and (3) the statute[] [was] at best only marginally relevant to the issues[.]" *Koenig v City of South Haven*, 221 Mich App 711, 728 (1997), rev'd on other grounds 460 Mich 667 (1999).

1.6 Burdens of Proof, Persuasion, and Production

A. Generally

> "The term 'burden of proof' is one of the 'slipperiest member[s] of the family of legal terms.' Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden

[4] MRE 201 only governs judicial notice of *adjudicative facts*. It "does not preclude judicial notice of *legislative facts*." MRE 201(a) (emphasis added).

> of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Schaffer v Weast*, 546 US 49, 56 (2005) (internal citations omitted).

The burden of production may shift several times during a trial, but the burden of persuasion generally remains with the plaintiff. *Widmayer v Leonard*, 422 Mich 280, 290 (1985). However, the burden of persuasion may rest with the defendant as to particular defenses. For example, a defendant claiming insanity bears the burden of proving it by a preponderance of the evidence. MCL 768.21a.

B. Burden of Proof/Persuasion

The party with the burden of persuasion has the duty of establishing the truth of his or her case according to the weight of evidence required. *McKinstry v Valley OB-GYN Clinic, PC*, 428 Mich 167, 178-179 (1987).

1. Preponderance of the Evidence

"Proof by a preponderance of the evidence requires that the fact[-]finder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *BCBSM v Milliken*, 422 Mich 1, 89 (1985).

2. Clear and Convincing Evidence

The intermediate burden of proof, clear and convincing evidence, has been defined as "evidence that 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *In re Chmura (After Remand)*, 464 Mich 58, 72 (2001), quoting *In re Martin*, 450 Mich 204, 227 (1995).

3. Beyond a Reasonable Doubt

The highest burden of proof is beyond a reasonable doubt. "It is a fundamental principle of our system of justice that an accused's guilt must be proved beyond a reasonable doubt to sustain a conviction." *People v Hubbard*, 387 Mich 294, 299 (1972). "A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that—a doubt that is

reasonable, after a careful and considered examination of the facts and circumstances of [a particular] case." CJI2d 3.2(3).[5]

4. Other Burdens of Proof/Persuasion

There are other burdens of proof created by case law, court rules, and rules of evidence. These typically relate to motions and evidentiary rulings.

Some motions require a showing of good cause. Examples include:

- Adjournments. MCR 2.503(D)(1).
- Unendorsed witnesses. MCR 2.401(I)(2).
- Substitution of counsel. *People v Ginther*, 390 Mich 436, 441 (1973).

Another burden of persuasion is due diligence. Examples include:

- Requests for second summons. MCR 2.102(D).
- Failure to produce an endorsed witness. See *People v Eccles*, 260 Mich App 379, 388 (2004).

C. Burden of Production (Burden of Going Forward)

"'[The burden of production] is usually cast first upon the party who has pleaded the existence of the fact, but . . . the burden may shift to the adversary when the pleader has discharged his [or her] initial duty. The burden of producing evidence is a critical mechanism in a jury trial, as it empowers the judge to decide the case without jury consideration when a party fails to sustain the burden.'" *McKinstry*, 428 Mich at 179, quoting McCormick, Evidence (3d ed), §336, p 946. Presumptions may affect the burden of production.[6] A presumption is "a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption." *Widmayer*, 422 Mich at 289. The party with the burden of production has the duty of introducing sufficient evidence to have the relevant issue considered by the court. *McKinstry*, 428 Mich at 179.

[5] CJI2d 3.2 must be given in its entirety in every criminal case. Only subsection (3) is referenced here.

[6] See Section 1.7 for a discussion of presumptions.

See *Stokes v Chrysler LLC*, 481 Mich 266 (2008), a worker's compensation case, where the Court concluded that once a claimant sufficiently proves to the court that he or she is disabled, the burden of production shifts from the claimant to the employer contesting the claim to challenge the claimant's proof of disability.

1.7 Presumptions

A. Civil Case

Presumptions in civil cases are governed by MRE 301:

> "In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

The Michigan Court of Appeals addressed presumptions in *Isabella Co DSS v Thompson*, 210 Mich App 612, 615-616 (1995) (internal citations omitted):

> "[A] presumption is a procedural device that regulates the burden of proceeding with the evidence. The presumption is dissipated, however, once substantial evidence has been submitted by its opponent.
>
> "In *Widmayer* [*v Leonard*, 422 Mich 280, 289 (1985)], our Supreme Court clarified some confusion in the law regarding presumptions and the effect of MRE 301:
>
> > "'[I]f the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.'
> >
> > "'We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and *it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption*.'

> "Thus, an unrebutted presumption can form the basis for a directed verdict or summary disposition in favor of the moving party."

If evidence is introduced to rebut a presumption, "the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence." *Widmayer*, 422 Mich at 289.

Once a judge concludes that the presumption has been rebutted, he or she "should not instruct the jury regarding the presumption: it no longer exists. It has, instead, become a permissible inference on the same level as any inference from the facts. Rather, the judge should instruct the jury about the burden of proof and the underlying facts." *State Farm Mut Auto Ins Co v Allen*, 191 Mich App 18, 23 (1991).

B. Criminal Case

Presumptions in criminal cases are governed by MRE 302:

> "**(a) Scope.** In criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.
>
> "**(b) Instructing the jury.** Whenever the existence of a presumed fact against an accused is submitted to the jury, the court shall instruct the jury that it may, but need not, infer the existence of the presumed fact from the basic facts and that the prosecution still bears the burden of proof beyond a reasonable doubt of all the elements of the offense."

CJI2d 3.2 must be given in every criminal case and states, in relevant part:

> "A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty." CJI 2d 3.2(1).

C. Statutory Presumptions

"Legislative [or statutory] presumptions are valid so long as there is a rational connection between the proven facts and the fact to be presumed. If the presumed fact is more likely than not to flow from the proven fact, the presumption is constitutionally valid." *People v Dorris*, 95 Mich App 760, 765 (1980) (internal citations omitted). In *Dorris*, the defendants appealed their conviction of being in possession of an incendiary device because the prosecution had not proven unlawful intent. *Dorris, supra* at 765. The Court concluded that presuming unlawful intent "was neither unreasonable nor unconstitutional" because "[i]ncendiary devices generally have no legal purpose" and "[i]t is more likely than not that one in possession of [an incendiary device] possesses [it] with unlawful intent." *Id.*

"When the trial court undertakes to eliminate from the jury's consideration a statutory presumption as a matter of law, at the very least there must be clear, positive, and credible evidence opposing the presumption." *White v Taylor Distributing Co*, 275 Mich App 615, 621 (2007). For example, MCL 257.402(a) (rear-end collision statute) provides that the offending driver is presumed to be guilty of negligence. *White, supra* at 621. However, this presumption may be rebutted by showing an adequate excuse or justification for the collision. *Id.*

1.8 Order of Proof

A. Generally

The trial court has the discretion to determine the order of proof and the sequence in which issues are tried. MRE 611(a); MCR 2.513(G).

B. Conditional Admission of Evidence

MRE 104(b) permits the admission of evidence conditioned upon subsequent proof of relevancy.[7]

C. Rebuttal Evidence

"[A] prosecutor may not divide the evidence on which the people propose to rest their case, saving some for rebuttal." *People v Losey*, 413 Mich 346, 351 (1982). "Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the

[7] See Section 1.3 on admissibility.

other party and tending directly to weaken or impeach the same.' The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *People v Figgures*, 451 Mich 390, 399 (1996). See also *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 348-349 (1991). According to the Michigan Supreme Court:

> "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Figgures*, 451 Mich at 399.

D. Reopening Proofs

Generally, whether to reopen proofs for a party rests within the sound discretion of the trial judge. *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 269 Mich App 25, 41 (2005), rev'd in part on other grounds 479 Mich 280 (2007). Relevant in ruling on a motion to reopen proofs is "(1) the timing of the motion, (2) whether the adverse party would be surprised, deceived, or disadvantaged by reopening the proofs, and (3) whether there would be inconvenience to the court, parties, or counsel." *Michigan Citizens, supra* at 50-51.

1.9 Limitations on Evidence

Although a trial court is entitled to control the proceedings in the courtroom, the court cannot do so at the expense of a defendant's constitutional rights. *People v Arquette*, 202 Mich App 227, 232 (1993). In *Arquette*, the defendant was declared indigent, but retained an appellate attorney with the help of his parents. *Arquette, supra* at 229. The trial court administrator refused the attorney's request for a transcript of the trial court proceedings at the public's expense. *Id.* Subsequently, the attorney withdrew from the case, another attorney was appointed, and the transcript was prepared at the public's expense. *Id.* The appointed attorney then withdrew from the case, and the former retained attorney filed another appearance on behalf of the defendant. *Id.* at 229-230. The trial court denied the motion because it found that the attorney had fraudulently withdrawn from the case in order to get the transcript prepared at the public's expense. *Id.* at 230. The Court of Appeals

disagreed and concluded that the trial court's refusal to designate retained counsel amounted to a constitutional violation. *Id.* at 231-232.

A. Precluding a Witness From Testifying

MCR 2.401(I)(2) allows a trial court to prohibit testimony from witnesses not identified in a pretrial order or required witness list.

"Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses." *Pastrick v Gen Tel Co of Michigan*, 162 Mich App 243, 245 (1987). The court may impose reasonable conditions on allowing the testimony of an undisclosed witness if there is no prejudice to the opposing party. *Pastrick, supra* at 246. In *Pastrick*, the Court of Appeals concluded that the trial court employed reasonable conditions in allowing the prosecutor's undisclosed rebuttal witness to testify by giving the "defendants an opportunity to interview the undisclosed witness and to secure their own experts[.]" *Id.* The Court also noted that a reasonable condition will also normally include a reasonable time frame. *Id.* at 247 n 1.

In deciding whether the court will sanction the party by precluding a witness from testifying, the court should consider the following factors on the record:

> "'(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendants; (4) actual notice to the defendant of the witnesses and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.'" *Duray Development, LLC v Perrin*, 288 Mich App 143, 165 (2010), quoting *Dean v Tucker*, 182 Mich App 27, 32-33 (1990).

Where an unlisted expert's testimony was important to the defendant's case and the prosecution would have had adequate time to prepare for it, the trial court abused its discretion when it denied the defendant's late request to add the expert to the witness list. *People v Yost*, 278 Mich App 341, 380-381 (2008). According to the Court of Appeals, the trial court's decision to preclude the defense expert's testimony did not fall within the range of reasonable and

principled outcomes because without the expert's testimony, the defendant was unable to establish a defense regarding whether the victim actually died of an overdose. Without the expert's testimony, the defendant was also unable to contradict the prosecutor's assertions regarding the number of pills needed to cause an overdose. *Yost, supra* at 386. The Court explained:

> "[G]iven the nature of the toxicology evidence against defendant, the trial court should have realized that the importance of the toxicologist to the defense substantially outweighed any prejudice that the prosecution might suffer in preparing for the late endorsement." *Id.*

B. Limitations on Questioning

MRE 403 and MRE 611(a) authorize the court to restrict the length of time a witness may be questioned. See also *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595-596 (1991). In *Hartland Twp*, on the fifth day of trial, the court limited both direct and cross-examination of witnesses to one hour. *Hartland Twp, supra* at 596. The Michigan Court of Appeals concluded that "[t]he record shows that the trial court properly exercised its discretion in limiting the time for examination of witnesses." *Id.* at 596. See also *Alpha Capital Management, Inc v Rentenbach*, 287 Mich App 589, 616-618 (2010), where the trial court's decision to limit witness testimony to 1.5 hours was not an abuse of discretion where "counsel had adequate time to develop the facts and issues at the center of the parties' dispute" and "the trial court permitted [the plaintiff] more than three hours for its examination of [one of its key witnesses] on the basis of counsel's pledge that he could complete the rest of the witness examinations in a half hour." The Court of Appeals noted that it disapproves of "utterly arbitrary time limitations unrelated to the nature and complexity of a case or the length of time consumed by other witnesses." *Alpha Capital Management, supra* at 618 n 12. However, because the court used a time limitation suggested by the plaintiff, it was not arbitrary. *Id.* But, see *Barksdale v Bert's Marketplace*, 289 Mich App 652, 657 (2010), where the trial court's decision to limit witness examination to 30 minutes per side was arbitrary and an abuse of discretion. In *Barksdale*, both sides quickly picked a jury, delivered opening statements, and the plaintiff's attorney quickly examined the plaintiff, "without repetitive or irrelevant questions." *Barksdale, supra* at 657. The Court of Appeals concluded that the facts in *Barksdale* were distinguishable from those in *Alpha Capital Management, supra*, and could "discern no reasonable basis for the trial court's determination that limiting witness examinations to 30 minutes for each side advanced the trial management goals set forth in MRE 611(a)." *Barksdale, supra* at 657.

Thus, the trial court "impos[ed] an utterly arbitrary time limit for witness examinations," which resulted in an abuse of discretion. *Id.*

Restrictions on a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. *Rock v Arkansas*, 483 US 44, 55-56 (1987).

Committee Tip:

If the judge feels it is necessary to intervene and limit the questioning of a witness, the judge should tell the jury that he or she is not trying to suggest any opinion about the case nor favor one side, but merely trying to move the case along.

C. Limiting Cumulative Evidence

The court has discretion to exclude cumulative evidence. MRE 403; *People v Blackston*, 481 Mich 451, 461 (2008). Where a witness's testimony "was entirely consistent with that of several prior witnesses[,]" the trial court properly excluded it on the basis of cumulative evidence. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 608 (1991). "Any error resulting from the exclusion of cumulative evidence is harmless." *Badiee v Brighton Area Schools*, 265 Mich App 343, 357 (2005).

1.10 Privileges

A. Source and Scope

"Privilege[s are] governed by the common law, except as modified by statute or court rule." MRE 501.

The Michigan Supreme Court explained the purpose of the privilege statutes:

> "Unlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster relationships. While the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth. Privileges therefore are not easily found or

endorsed by the courts. 'The existence and scope of a statutory privilege ultimately turns on the language and meaning of the statute itself.' Even so, the goal of statutory construction is to ascertain and facilitate the intent of the Legislature." *People v Stanaway*, 446 Mich 643, 658 (1994) (internal citations omitted).

Committee Tip:

When presented with an asserted privilege, the court may consider employing the following analysis:

- *What privilege is claimed?*
- *Was there a relationship covered by the privilege?*
- *Was there a communication covered by the privilege?*
- *Who holds the privilege?*
- *Has the privilege been waived (expressly, impliedly, or by statute or court rule)? See, for example, MCL 600.2157.*
- *May the privileged communications be disclosed? See, for example, MCL 330.1750.*

B. Assertion of Privilege

1. Invoking a Privilege

Generally, criminal defendants and civil litigants lack the standing to assert a privilege on behalf of a third party. *People v Wood*, 447 Mich 80, 89 (1994). For example, a hospital or a physician may not invoke a patient's physician-patient privilege on behalf of the patient where the patient has no desire to invoke the privilege. *Samson v Saginaw Bldg Prof, Inc*, 44 Mich App 658, 670 (1973).

2. Determining the Validity of a Claim

A trial court must follow an established procedure when it discovers that a potential witness plans to invoke a testimonial privilege. *People v Paasche*, 207 Mich App 698, 709 (1994). In *Paasche*, the Court of Appeals explained how trial courts should handle these situations:

> "First, a trial court must determine whether the witness understands the privilege and must provide an adequate explanation if the witness does not. The court must then hold an evidentiary hearing outside the jury's presence to determine the validity of the witness'[s] claim of privilege. If the court determines the assertion of the privilege to be valid, the inquiry ends and the witness is excused.
>
> "If the assertion of the privilege is not legitimate in the opinion of the trial judge, the court must then consider methods to induce the witness to testify, such as contempt and other proceedings. If the witness continues to assert the privilege, the court must proceed to trial without the witness, because there is no other way to prevent prejudice to the defendant." *Paasche, supra* at 709-710 (internal citations omitted).

Committee Tip:

Where there is a claim of privilege under the Fifth Amendment, some courts offer to appoint an attorney for the witness, or allow the witness to bring in his or her own attorney if time permits before making a determination on the validity of the claim.

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3. Discovery

In civil cases, privileged material may not be obtained through discovery. MCR 2.302(B)(1). If a party knows before his or her deposition that he or she will assert a privilege, the party must move to prevent the taking of the deposition or be subject to costs under MCR 2.306(G). MCR 2.306(D)(4). A party must assert a privilege at his or her deposition or lose it. MCR 2.306(D)(5). If the privilege is asserted, the party may not, at trial, offer his or her testimony on the evidence objected to during the deposition. MCR 2.306(D)(5). But see MCL 330.1750(2) and MCL 600.2157, which require disclosure of, or indicate the waiver of, certain privileged communications in specific circumstances.

In felony cases, privileged information is generally not discoverable. MCR 6.201(C)(1). However, if the "defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records." MCR 6.201(C)(2). MCR 6.201(C)(2)(a)–MCR 6.201(C)(2)(e) explains how the court should proceed once an in camera inspection has been conducted.

C. Waiver

Generally, the right to waive a privilege belongs to the individual making the communication. For example, only the patient may waive the physician-patient privilege. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 34 (1999). Similarly, only the client may waive the attorney-client privilege. *Leibel v Gen Motors Corp*, 250 Mich App 229, 240 (2002). But see MCL 600.2162(5)–MCL 600.2162(7), which provides that the decision whether to waive the spousal communication privilege in certain types of cases rests with the spouse whose testimony is sought, not necessarily the spouse who made the communication.

D. Recognized Privileges

The following table is a nonexhaustive list of commonly recognized confidential communications and the authority that governs each communication:

Table 2: Common Privileges

Privilege	Authority
Attorney-client privilege	MRPC 1.6
Attorney work product privilege	MCR 2.302(B)(3)(a)
Clergy-penitent privilege	MCL 600.2156 MCL 767.5a(2)
Confidential communication to crime stoppers organization	MCL 600.2157b
Confidential informant (for journalists)	MCL 767.5a

Table 2: Common Privileges

Privilege	Authority
Confidential informant (for police)	*People v Underwood*, 447 Mich 695, 703-707 (1994)
CPA-client privilege	MCL 339.732
Dentist-patient privilege	MCL 333.16648
Hospital records-peer review privilege	MCL 333.21515
Mediation communications	MCR 2.411(C)(5); MCR 2.412)
Physician-patient privilege	MCL 600.2157 MCL 767.5a(2)
Polygraph examiner privilege	MCL 338.1728(3)
Privilege against self-incrimination	US Const, Am V; Const 1963, art 1 § 17
Probation records and reports	MCL 791.229
Psychologist-patient privilege	MCL 333.18237
School official-student privilege	MCL 600.2165
Spousal communication privilege	MCL 600.2162
Trade secrets	MCR 2.302(C)(8)

1.11 Missing Physical Evidence

A. Civil Case

A fact-finder either must presume or may infer that missing, lost, or destroyed evidence operates against the party who misplaced, destroyed, or failed to produce it. An adverse *presumption* arises from intentional or fraudulent conduct, while an adverse *inference* is permissible under M Civ JI 6.01(d) for a failure to produce evidence

with no reasonable excuse. *Ward v Consolidated Rail Corp*, 472 Mich 77, 84-86 (2005). "A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Ward, supra* at 85-86. In *Ward*, the defendant introduced evidence that missing evidence was disposed of as part of a routine business practice, thereby rebutting the presumption that the missing evidence was intentionally made unavailable. *Ward, supra* at 82. The Court held that "the trial court erred when it instructed the jury that it could draw an adverse inference, but failed to explain that no inference should be drawn if [the jury concluded that the] defendant had a reasonable excuse for its failure to produce the evidence." *Id.* at 80.

A party may be sanctioned for spoliation of evidence even though the evidence was not technically lost or destroyed. *Bloemendaal v Town & Country Sports, Inc,* 255 Mich App 207, 212 (2003). In *Bloemendaal*, the plaintiff's experts failed to conduct a test on a piece of evidence during disassembly "that was essential to their ultimate theory of liability." *Bloemendaal, supra* at 214. The Court concluded that failure to conduct the test amounted to a failure to preserve the evidence. *Id.* Because the defendants were precluded from conducting their own tests (which could only be done while the evidence was being disassembled), they were severely prejudiced and dismissal was appropriate where the trial court considered "other remedies and concluded that they were insufficient to overcome the prejudice[.]" *Id.* at 214-215. However, the Court noted that even though dismissal is a possible sanction, it is a drastic step that should be taken cautiously and only after evaluating all other available options on the record. *Bloemendaal,* 255 Mich App at 214.

B. Criminal Case

The failure to preserve or produce material exculpatory evidence violates a defendant's due process rights. *Arizona v Youngblood*, 488 US 51, 57 (1988). It is not necessary for a defendant to demonstrate a government official's bad faith in destroying or suppressing evidence if the evidence is clearly materially exculpatory, because the loss of such evidence "directly threatens the fundamental fairness of a criminal trial, and thus undoubtedly implicates the Due Process Clause." *Moldowan v City of Warren*, 578 F3d 351, 385 (CA 6, 2009). However, where the evidence at issue is only potentially useful, a showing of bad faith is required. *Moldowan, supra* at 392. "In other words, the critical issue in determining whether government conduct deprived a criminal defendant of a fair trial is

the nature of the evidence that was withheld; it emphatically is not the mental state of the government official who suppressed the evidence." *Id.* at 384. The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Hanks*, 276 Mich App 91, 95 (2007). It is the trial court's responsibility, not the jury's, to determine whether the missing evidence was destroyed in bad faith. *People v Cress*, 466 Mich 883 (2002).

Chapter 2: Relevancy

2.1 Relevant Evidence

A. Relevant Evidence Defined

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

There are two separate questions that must be answered in determining whether evidence is relevant:

> "First, [the court] must determine the 'materiality' of the evidence. In other words, [the court] must determine whether the evidence was of consequence to the determination of the action. Second, [the court] must determine the 'probative force' of the evidence, or rather, whether the evidence makes a fact of

consequence more or less probable than it would be without the evidence.

> "Materiality, under Rule 401, is the requirement that the proffered evidence be related to 'any fact *that is of consequence*' to the action. . . . A fact that is 'of consequence' to the action is a material fact. 'Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial.'
>
> * * *
>
> "In addition to determining the materiality of the evidence, [the court] must also consider the principle of probative force. Probative force is the 'tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Further, 'any' tendency is sufficient probative force." *People v Mills*, 450 Mich 61, 67-68 (1995) (internal citations omitted).

B. Relevant Evidence Admissible

Relevant evidence is generally admissible. MRE 402. In *People v Hampton*, 407 Mich 354, 367 (1979), the Michigan Supreme Court addressed the issue of admissibility as follows:

> "Under MRE 402, all relevant evidence is admissible unless otherwise excluded. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence, MRE 401. The test of relevancy is designed to determine whether a single piece of evidence is of such significant import that it warrants being considered in a case. The standards for admissibility are designed to permit the introduction of all relevant evidence, not otherwise excluded, on the theory that it is best to have as much useful information as possible in making these types of decisions[.]" (Internal citations omitted.)

C. Exclusion of Relevant Evidence (Balancing Test)

MRE 403 states that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"'Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v Blackston*, 481 Mich 451, 462 (2008), quoting *People v VanderVliet*, 444 Mich 52, 81 (1993). The analysis involved in MRE 403 determinations requires the court to balance several factors, "including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects." *Blackston, supra* at 462.

The Michigan Court of Appeals addressed the issue of "unfair prejudice":

> "'Unfair prejudice' does not mean 'damaging.' *Bradbury v Ford Motor Co*, 123 Mich App 179, 185 (1983). Any relevant testimony will be damaging to some extent. We believe that the notion of 'unfair prejudice' encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of 'prejudice' exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist. Unfairness might not exist where, for instance, the critical evidence supporting a party's position on a key issue raises the danger of prejudice within the meaning of MRE 403 as we have defined this term but the proponent of this evidence has no less prejudicial means by which the substance of this evidence can be admitted." *Sclafani v Peter S Cusimano Inc*, 130 Mich App 728, 735-736 (1983).

The trial court did not abuse its discretion or unfairly prejudice the defendant by admitting evidence of the defendant's participation in "a serious and entirely separate crime." *People v Murphy (On*

Remand), 282 Mich App 571, 583 (2009). In *Murphy*, the defendant robbed the victim at gunpoint while stopped at a traffic light. *Murphy, supra* at 573-574. The trial court properly admitted evidence of the defendant's subsequent participation in a separate carjacking because (1) it connected the defendant to the vehicle and weapon used to rob the victim, (2) the prosecutor never argued to the jury that the defendant's participation in the subsequent carjacking established his guilt in the armed robbery, and (3) the judge issued a cautionary instruction to the jury limiting the possibility of undue prejudice. *Id.* at 583.

Committee Tip:

Subject to any exceptions listed in the specific rule, MRE 404 and MRE 407–MRE 411 exclude from admission certain categories of evidence that may be otherwise relevant to the case. These include character evidence, subsequent remedial measures, settlement negotiations, payment of medical expenses, plea discussions, and insurance coverage. Although these matters may be relevant, they are generally excluded by MRE 403 because they are generally more prejudicial than probative as a matter of law.

2.2 Character Evidence

A. Character Evidence Generally Not Admissible to Prove Conduct

Generally, evidence of a person's character or a character trait, and evidence of other crimes, wrongs, or acts are generally not admissible for the purpose of showing action in conformity with the person's character. MRE 404(a) and MRE 404(b). "Such evidence is strictly limited because of its highly prejudicial nature; there is a significant danger that the jury will overestimate the probative value of the character evidence." *People v Roper*, 286 Mich App 77, 91 (2009).

Exceptions. MRE 404(a) contains exceptions that permit the admission of evidence of a person's character or a character trait to prove action in conformity with such character on a specific occasion. They include:

- MRE 404(a)(1) — Character of the accused (under very specific circumstances—when offered by the accused, for example)[1]
- MRE 404(a)(2) — Character of an alleged victim of homicide[2]
- MRE 404(a)(4) — Character of a witness[3]

MRE 404(a)(3) allows use of specific acts of the alleged victim in criminal sexual conduct cases for specified purposes other than to prove character:

- Evidence of the alleged victim's past sexual conduct with the accused.
- Evidence of the alleged victim's past sexual conduct with others, where offered to show the source or origin of pregnancy, semen, or disease.

MRE 404(b)[4] lists examples of instances where evidence of other crimes, wrongs, or acts may be admitted for purposes other than to show propensity to commit the crime charged, when those purposes are relevant to an issue in the case. See *People v VanderVliet*, 444 Mich 52, 74 (1993). Those purposes include:

- Motive,
- Opportunity,
- Intent,
- Preparation,
- Scheme, plan, or system in doing an act,
- Knowledge,
- Identity, or
- Absence of mistake or accident when the same is material.

Doctrine of chances. In many MRE 404(b) cases, it may be necessary to discuss the "doctrine of chances," which states that "as the

[1] See Section 2.2(C).

[2] See Section 2.2(D)(1).

[3] See Section 2.2(E).

[4] See Section 2.2(F) for a detailed discussion of MRE 404(b).

number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act *and/or* the prior occurrences were not the result of natural causes." *People v Mardlin*, 487 Mich 609, 616 (2010). In other words, "[i]f a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative . . . of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to happenstance." *Mardlin, supra* at 617. In *Mardlin*, the defendant's home was damaged by fire after which he filed an insurance claim for the damage to his home. *Id.* at 612. The defendant was charged with arson after an investigation showed that the fire had been intentionally set. *Id.* During the previous 12 years, the defendant had also been "associated with four previous home or vehicle fires—each of which also involved insurance claims and arguably benefitted defendant in some way[.]" *Id.* at 613. The Michigan Supreme Court concluded that evidence of the previous fires was admissible "precisely because they constituted a series of similar incidents—fires involving homes and vehicles owned or controlled by defendant—the frequency of which objectively suggested that one or more of the fires was not caused by accident." *Id.* at 619. The Court explained that the evidence "need not bear striking similarity to the offense charged if the theory of relevance does not itself center on similarity." *Id.* at 620. The Court explained:

> "Rather, '[w]here the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, *similarity between charged and uncharged conduct is not required*.' Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission. Thus, the 'level of similarity required when disproving innocent intent is less than when proving modus operandi.' 'When other acts are offered to show innocent intent, logical relevance dictates only that the charged crime and the proffered other acts "are of the same general category."' Past events—such as fires in relation to an arson case—that suggest the absence of accident are offered on the basis of a theory of logical relevance that is a subset of innocent intent theories. As such, the past events need *only* be of the same general category as the charged offense." *Mardlin*, 487 Mich at 622-623, quoting *VanderVliet*, 444 Mich at 69, 79-80, 80 n 36.

Statutes that permit the use of past specific acts of the accused in specified classes of criminal cases to be used to prove conduct on the date charged, include:

- Prior listed offenses committed against a minor. MCL 768.27a(1).[5]
- Prior domestic violence offenses. MCL 768.27b.[6]

B. Presenting Character Evidence

1. Reputation and Opinion

MRE 405(a) states:

> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct."

Evidence of the "[r]eputation of a person's character among associates or in the community" is not excluded by the hearsay rule. MRE 803(21).

a. Reputation in the Community

Reputation evidence is admissible when it is based on the party's or the witness's reputation in his or her residential or business community. *People v Bieri*, 153 Mich App 696, 712-713 (1986). "One's community can be either where one lives or works, and a reputation may be established wherever one interacts with others over a period of time." *Bieri, supra* at 713. In *Bieri*, the Court found that jail could be considered a residential community where the amount of time that the individual spends there is sufficient to establish a reputation, and the witness in fact becomes acquainted with the individual's reputation. *Id.*

b. Basis for Witness's Knowledge of Reputation

A character witness must have knowledge about the reputation of the individual about whom he or she is testifying. *People v King*, 158 Mich App 672, 678 (1987).

[5] See Section 2.2(F) on MCL 768.27a. "Listed offenses" are contained in MCL 28.722.

[6] See Section 2.2(F) on MCL 768.27b.

"[T]estimony regarding a person's character can only relate what the witness has heard others say about the person's reputation, and cannot relate specific instances of the person's conduct or the witness's personal opinion as to the person's character. *King, supra* at 678.

c. Opinion Testimony

A party may call a witness "to offer testimony concerning [his or her] personal opinion of [a] person's character" *Roper*, 286 Mich App at 97. The witness's opinion must be derived from his or her association with the person whose character is in question. See *People v Dobek*, 274 Mich App 58, 102 (2007). An opinion by a psychologist based on psychological testing and interviews will not satisfy MRE 405(a); the opinion must come from knowing the person and how he or she lived his or her life. *Dobek, supra* at 102.

d. Extrinsic Evidence

Generally, MRE 405(a) does not permit a party to prove character through evidence of specific instances of conduct. *Roper*, 286 Mich App at 104. However, "a prosecutor may elicit testimony through a rebuttal witness concerning specific instances of conduct where a defendant places his [or her] character at issue on direct examination and then denies the occurrence of specific instances of conduct on cross-examination." *Roper, supra* at 102, citing *People v Vasher*, 449 Mich 494 (1995). Notwithstanding the limitations in MRE 405, rebuttal evidence involving specific conduct may be introduced to prove a defendant's character if all of the following are true:

- during direct examination, the defendant placed his or her character at issue;
- the prosecution cross-examined the defendant regarding specific instances of conduct that "tend[ed] to show that the defendant did not have the character trait he or she asserted on direct examination";
- the defendant denied in whole or in part the specific instances brought up by the prosecution during cross-examination; and
- the rebuttal testimony offered by the prosecution was limited to contradicting the defendant's

cross-examination testimony. *Roper*, 286 Mich App at 105, citing *Vasher*, 449 Mich at 504-506.

2. Specific Instances of Conduct

MRE 405(b) states:

> "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct."

Where the defendant was charged with two counts of first-degree murder, and his defense was that he was not present and did not commit the crime, evidence of specific instances of the defendant's good conduct were inadmissible because "[n]either the charge nor the defense employed [made] character an essential element." *People v Williams (Terry)*, 134 Mich App 639, 642 (1984). The Court stated, "It is only in the narrow situation where character is an element of the offense that specific acts of conduct are admissible to show character under MRE 405(b)." *Terry Williams, supra* at 642. See also *People v Orlewicz*, ___ Mich App ___, ___ (2011) (where character was not an essential element of the defendant's self-defense claim, evidence of PPOs issued against the victim were properly excluded as specific instances of conduct, but evidence of the victim's MySpace page should have been admitted because it did not constitute a specific instance of conduct). The *Orlewicz* Court stated:

> "While a social networking or other kind of personal website might well contain depictions of specific instances of conduct, such a website must be deemed a gestalt and not simply a conglomerate of parts. When regarded as *itself*, a social networking or personal website is more in the nature of a semi-permanent yet fluid autobiography presented to the world. Clearly, because people change over time, its relevance might be limited only to recent additions or changes; furthermore, it is obviously possible for people to misrepresent themselves, which could present a fact issue. But in the abstract, social networking and personal websites constituted general reputational evidence rather than specific instances of conduct[.]" *Orlewicz*, ___ Mich App at ___.

C. Evidence of Character of Defendant

1. Offered by Defendant

Evidence of a defendant's pertinent character trait may be offered by the defendant to prove that he or she acted in conformity with that trait on a particular occasion. MRE 404(a)(1). See also *People v Whitfield*, 425 Mich 116, 130-131 (1986), where the Court stated:

> "MRE 404(a)(1) . . . allows a criminal defendant an absolute right to introduce evidence of his [or her] character to prove that he [or she] could not have committed the crime. MRE 404(a)(1) allows the introduction of '[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.' The latter part of MRE 404(a)(1) is the source of the doubt about the wisdom of presenting character evidence as part of an accused's defense: Once a defendant introduces character testimony, the prosecution can then rebut that testimony. Under MRE 405(a), the accused can only present favorable character evidence in the form of reputation [and opinion] testimony."[7]

2. Offered by Prosecution

The prosecution may present evidence of a pertinent character trait of a defendant only to rebut character evidence presented by the defense; or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under MRE 404(a)(2), evidence of a trait of character for aggression of the accused may be offered by the prosecution. MRE 404(a)(1). *Whitfield*, 425 Mich at 130.

The prosecution may present testimony about a defendant's specific instances of conduct to rebut a defendant's assertion that "I'm not the person that . . . would want to do anything like that [react with violence], especially to a friend[,]" and the same defendant's denial that he reacted with violence to other situations in which he was confronted by an unhappy person. *Roper*, 286 Mich App at 94-105.

The prosecution is limited to rebutting the trait or traits introduced by the defendant. *People v Johnson (Johnnie)*, 409

[7] In 1991, MRE 405 was amended to also permit the admission of character evidence in the form of an opinion. See Section 2.2(B)(1)(d) for more information on MRE 405.

Mich 552, 561 (1980). "A defendant does not open the door to any and all evidence concerning his [or her] character merely by basing an argument on some aspects of his [or her] character. He [or she] opens the door only for evidence that his [or her] character is not what he [or she] claims it to be." *Johnnie Johnson, supra* at 561.

D. Evidence of Character of Victim

1. Homicide Victim

a. Offered by Defendant

"[E]vidence of a trait of character for aggression of the alleged victim of the crime" may be offered by a defendant when he or she is asserting self-defense in a homicide case. MRE 404(a)(2).

Character evidence of a deceased victim can be offered to prove that the victim acted in conformity with his or her violent reputation on a particular occasion, and thus, was the aggressor in the case at hand. *People v Harris (Jerry)*, 458 Mich 310, 315-316 (1998). If the defendant offers character evidence of the deceased victim to show that the defendant acted in self-defense, the evidence is being offered to show the defendant's state of mind, and the defendant must have had knowledge of the victim's violent reputation before the evidence will be admitted. *Jerry Harris, supra* at 316. If, however, the character evidence is being offered to show that the victim was the probable aggressor, the defendant need not know of the victim's reputation at the time. *People v Orlewicz*, ___ Mich App ___, ___ (2011). "[T]his form of character evidence may only be admitted in the form of reputation testimony, not by specific instances of conduct, unless those instances are independently admissible for some reason or where character is an essential element of a claim or defense." *Orlewicz*, *supra* at ___. In *Orlewicz*, the Court of Appeals found that social networking and personal websites may be used as character evidence because they are self-edited and thus "constitute general reputational evidence rather than specific instances of conduct." *Id.* at ___.

In cases where the defendant is claiming self-defense, a jury instruction on the alleged victim's past acts or reputation may be appropriate. See CJI2d 7.23. CJI2d 7.23(1) addresses past violent acts committed by the

alleged victim. CJI2d 7.23(2) addresses the alleged victim's reputation for cruelty and violence.

b. Offered by Prosecution

If the defendant is claiming self-defense in a homicide case, the prosecution may offer (1) rebuttal evidence against the defendant's claim that the alleged victim possessed an aggressive character trait, or (2) evidence of the alleged victim's peaceful character to rebut any evidence that he or she was the first aggressor. MRE 404(a)(2).

2. Sexual Assault Victim

MCL 750.520j (Rape Shield Act)[8] states:

> "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > "(a) Evidence of the victim's past sexual conduct with the actor.
> >
> > "(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> "(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether

[8] See the MIchigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 7, for more information on the rape shield provisions.

> the proposed evidence is admissible under subsection (1)."

See also MRE 404(a)(3), which permits "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

"When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case." *People v Benton*, ___ Mich App ___, ___ (2011). If a trial court determines that evidence of a victim's past sexual conduct is not admissible under one of the statutory exceptions, it must consider whether admission is required to preserve the defendant's constitutional right to confrontation; if the evidence is not so required, the court "should . . . favor exclusion" of the evidence." *Benton, supra* at ___, quoting *People v Hackett*, 421 Mich 338, 339 (1984).

"'[P]ast' sexual conduct refers to conduct that has occurred before the evidence is offered at trial." *People v Adair*, 452 Mich 473, 483 (1996). In *Adair*, the defendant was charged with sexually assaulting his wife and sought to introduce evidence of specific incidences when he and his wife engaged in consensual sexual relations *after* the alleged assault. *Adair, supra* at 477. In deciding whether subsequent sexual relations are sufficiently probative to be admitted, the court should consider (1) the length of time between the alleged assault and the subsequent sexual relations, and (2) whether the complainant and the defendant had a personal relationship before the alleged assault. *Id.* at 486-487. In explaining its reasoning, the Court stated:

> "On a common-sense level, a trial court could find that the closer in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant, the stronger the argument would be that if indeed she had been sexually assaulted, she would not have consented to sexual relations with him in the immediate aftermath of sexual assault. Accordingly, the evidence may be probative. Conversely, the greater the time interval, the less probative force the evidence may have, depending on the circumstances.
>
> "Even so, time should not be the only factor. The trial court should also carefully consider the circumstances and nature of the relationship

> between the complainant and the defendant. If the two did not have a personal relationship before the alleged sexual assault, then any consensual sexual relations after the alleged sexual assault would likely be more probative than if the two had been living together in a long-term marital relationship. Additionally, the trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to consensual sexual relations in spite of an earlier sexual assault." *Id.*

E. Evidence of Character of Witness (Impeachment)[9]

1. Reputation or Opinion

MRE 608(a) states:

> "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

Where a party attacks a witness's credibility, but not the witness's character for truthfulness, the opposing party may not present evidence to bolster the witness's truthful character. *People v Lukity*, 460 Mich 484, 490-491 (1999). In *Lukity*, the defense counsel, during his opening statement, asserted that the complainant had emotional problems which affected her ability to describe the alleged sexual assaults. *Lukity, supra* at 490. Before the complainant testified, the trial court allowed the prosecution to present testimony from several other witnesses as to the complainant's truthful character. *Id.* at 488-489. The Court of Appeals concluded that the defendant's opening statement did not implicate MRE 608(a), and the trial court abused its discretion in admitting evidence of the complainant's truthful character where her truthful character had never been attacked. *Id.* at 491.

It may be error for a court to allow character testimony that goes "beyond [the witness's] reputation for truthfulness and

[9] See Section 3.6 on impeachment.

encompasse[s] [the witness's] overall 'integrity.'" *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 102 (2009). In *Ykimoff* (a medical malpractice case), the defendant offered a surveillance videotape into evidence, showing the plaintiff engaging in certain activities, which "impliedly impugned [the] plaintiff's truthfulness, as it suggested that [the] plaintiff's residual injuries were not as extensive or limiting as alleged." *Ykimoff, supra* at 102. However, admitting the evidence was harmless error because witness testimony tended to prove the same things that the videotape showed. *Id.*

2. Specific Instances of Conduct

MRE 608(b) states in relevant part:

> "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'[s] credibility, other than conviction of crime as provided in [MRE] 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

Where a witness was not called as a character witness and did not testify on direct examination about the plaintiff's truthfulness or untruthfulness, the defendant was not permitted to cross-examine the witness about specific instances of the plaintiff's conduct for the purpose of impeaching the plaintiff. *Guerrero v Smith*, 280 Mich App 647, 655 (2008). In *Guerrero*, the plaintiff testified about his limited marijuana use. *Guerrero, supra* at 654. Defense counsel cross-examined one of the plaintiff's witnesses in an effort to impeach the plaintiff's testimony regarding his marijuana use. *Id.* The Michigan Court of Appeals concluded that the witness's testimony should not have been admitted because it did not satisfy the technical requirements of MRE 608(b)(2). *Guerrero, supra* at 654. The Court stated:

> "Before specific instances concerning another witness's character for truthfulness or untruthfulness may be inquired into on cross-examination, the witness subject to cross-examination must already have testified on direct

examination regarding the other witness's character for truthfulness or untruthfulness." *Id.* at 654-655.

F. Other Acts Evidence

1. Rules and Statutes

a. MRE 404(b)

MRE 404(b)(1) states:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

"MRE 404(b) applies to the admissibility of evidence of other acts of *any* person, such as a defendant, a plaintiff, or a witness." *People v Rockwell*, 188 Mich App 405, 409-410 (1991). The rule applies to both civil and criminal cases. *Wlosinski v Cohn*, 269 Mich App 303, 322 (2005).

A ruling on whether to admit MRE 404(b) evidence does not require an evidentiary hearing if no motion in limine was filed. See *People v Williamson*, 205 Mich App 592, 596 (1994), where the Court stated:

> "[T]he trial court's failure to conduct an evidentiary hearing regarding the admissibility of the evidence does not require reversal. Neither *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), nor *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990), mandates that an evidentiary hearing be held where, as in this case, no motion in limine has been made by the defense."

b. MCL 768.27

MCL 768.27 provides for the admission of other acts evidence. It is the statutory equivalent of MRE 404(b). *People v Smith (Anthony)*, 282 Mich App 191, 204 (2009). MCL 768.27 states:

> "In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

c. MCL 768.27a

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. It applies only to criminal cases. MCL 768.27a(1) states in part:

> "Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

"Listed offenses" are contained in MCL 28.722. MCL 768.27a(2)(a).

A showing of similarity between the prior offense and the charged offense is unnecessary under MCL 768.27a. *People v Brown (Bryan)*, ___ Mich App ___, ___ (2011).

"MCL 768.27a does not contain a temporal time limitation." *Brown (Bryan)*, ___ Mich App at ___. Thus, the length of time between the prior offense and the charged offense is irrelevant. *Id.* at ___.

In *People v Pattison*, 276 Mich App 613 (2007), the Court found that MCL 768.27a did not violate the Ex Post Facto Clause because admission of propensity evidence occurring before the statute's effective date "[did] not lower the quantum of proof or value of the evidence needed to convict a defendant." *Pattison*, *supra* at 619.

Because MCL 768.27a "'does not principally regulate the operation or administration of the courts,'" it is a substantive rule of evidence and prevails over MRE 404(b). *People v Watkins*, 277 Mich App 358, 364-365 (2007), quoting *Pattison*, 276 Mich App at 619.

In order to conform to the Legislature's intent in enacting MCL 768.27a, the statute should be used as a rule of inclusion, not exclusion. *Smith (Anthony)*, 282 Mich App at 205. Although it is unnecessary to consider MCL 768.27a when evidence is deemed admissible under MCL 768.27 or MRE 404(b), "the proper analysis chronologically is to begin with MCL 768.27a when addressing other-acts evidence that can be categorized as involving a sexual offense against a minor and make a determination whether 'listed offenses' are at issue relative to the crime charged and the acts sought to be admitted." *Smith (Anthony), supra* at 205. In examining the admissibility of an offense committed against a minor, the Michigan Court of Appeals offered the following guidance:

> "Where listed offenses are at issue, the analysis begins and ends with MCL 768.27a. If listed offenses are not at issue, even where an uncharged offense may genuinely constitute an offense committed against a minor that was sexual in nature, MCL 768.27a is not implicated, but this is not to say that evidence of the offense is inadmissible. We do not construe MCL 768.27a as suggesting that evidence of an uncharged sexual offense committed against a minor is inadmissible if the offense does not constitute a listed offense. Rather, the analysis simply turns to MRE 404(b) to decipher admissibility. Only where the evidence does not fall under the umbrella of MCL 768.27a, nor is otherwise admissible under MRE 404(b), should the court exclude the evidence. *Smith (Anthony), supra* at 205-206.

See CJI2d 20.28a for an instruction on Evidence of Other Acts of Child Sexual Abuse.

d. MCL 768.27b[10]

MCL 768.27b governs the admissibility of evidence of acts of domestic violence. "[P]rior-bad-acts evidence of domestic violence can be admitted at trial because 'a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed.'" *People v Cameron*, 291 Mich App 599, 610 (2011), quoting *Pattison*, 276 Mich App at 620. MCL 768.27b states in part:

> "(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE] 403.
>
> * * *
>
> "(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice."

The Michigan Court of Appeals extended to MCL 768.27b the holding in *Pattison*, 276 Mich App at 558, that MCL 768.27a does not constitute an ex post facto law. *People v Schultz*, 278 Mich App 776, 778-779 (2008). Subject to the requirements listed there, MCL 768.27b permits the prosecution to introduce a defendant's guilty plea from an earlier case. In rejecting the defendant's ex post facto argument, the Court stated:

> "[MCL 768.27b] does not permit conviction on less evidence or evidence of a lesser quality. As with the sister statute [(MCL 768.27a)] analyzed in *Pattison*, MCL 768.27b did not change the burden of proof necessary to establish the crime, ease the presumption of innocence, or downgrade the type of evidence necessary to support a conviction.

[10] MCL 768.27b is only applicable "to trials and evidentiary hearings commenced or in progress on or after May 1, 2006." MCL 768.27b(6).

> Therefore, the statute affects only the admissibility of a type of evidence, and its enactment did not turn otherwise innocent behavior into a criminal act." *Schultz, supra* at 778-779 (internal citations omitted).

In addition, MCL 768.27b does not violate the separation of powers doctrine. *Schultz*, 278 Mich App at 779. The *Schultz* Court responded to the defendant's separation of powers argument by emphasizing that the Legislature's passage of MCL 768.27b was a reaction to the judicially created standards in MRE 404(b). *Schultz, supra* at 779. The Court stated that "[MCL 768.27b] is a substantive rule engendered by a policy choice, and it does not interfere with our Supreme Court's constitutional authority to make rules that govern the administration of the judiciary and its process." *Schultz, supra* at 779.

See CJI2d 5.8c for an instruction on Evidence of Other Acts of Domestic Violence.

2. *VanderVliet* Test

MRE 404(b) codifies the requirements set forth in *VanderVliet*, 444 Mich 52. The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity,[11] is generally governed by the test established in *VanderVliet,* which is as follows:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime. *VanderVliet*, 444 Mich at 74.
- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial. *VanderVliet, supra* at 74.
- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other appropriate facts. *VanderVliet, supra* at 74-75.
- Upon request, the trial court may provide a limiting instruction[12] under MRE 105, cautioning the jury to

[11] See Section 2.2(F)(1)(3) for a discussion on how modus operandi evidence used to prove identity may be admissible.

[12] The jury instruction is CJI2d 4.11.

> use the evidence for its proper purpose and not to infer that a bad or criminal character caused the defendant to commit the charged offense. *VanderVliet, supra* at 75.

The Supreme Court in *VanderVliet* characterized MRE 404(b) as a rule of inclusion rather than exclusion:

> "There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he [or she] acted in conformity therewith.
>
> * * *
>
> "Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *VanderVliet, supra* at 65.

The *VanderVliet* case underscores the following principles of MRE 404(b):

- There is no presumption that other acts evidence should be excluded. *VanderVliet, supra* at 65.
- The rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except criminal propensity. *VanderVliet, supra* at 65.
- A defendant's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial. *VanderVliet, supra* at 78.
- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet, supra* at 68, 71-72.

If other acts evidence is admissible for a proper purpose under MRE 404(b), it should not be deemed inadmissible simply because it also demonstrates criminal propensity. See *VanderVliet*, 444 Mich at 65. In cases where the evidence is admissible for one purpose but not others, the trial court may,

upon request, give a limiting instruction pursuant to MRE 105. *People v Sabin*, 463 Mich 43, 56 (2000). The trial court has no duty to give a limiting instruction sua sponte. *People v Chism*, 390 Mich 104, 120-121 (1973). However, the Michigan Supreme Court stated that the trial court *should* give a limiting instruction even in the absence of a party's request. *Chism, supra* at 120-121.

The continued viability of *VanderVliet's* analytical framework, and its characterization of MRE 404(b) as a rule of inclusion rather than exclusion, was affirmed in *Sabin (After Remand)*, 463 Mich at 55-59, and in *People v Katt*, 248 Mich App 282, 304 (2001).

Committee Tip:

It is the best practice to conduct the VanderVliet analysis on the record. However, the court is not required to do so. People v Steven D Smith, 243 Mich App 657, 675 (2000), remanded on other grounds 465 Mich 931 (2001).

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3. *Golochowicz* Test

Another test for admission of other acts evidence results from *People v Golochowicz*, 413 Mich 298, 309 (1982). Generally speaking, the *VanderVliet* test has supplanted the *Golochowicz* test. However, the *Golochowicz* test remains valid when the proponent of other acts evidence seeks to show identification through modus operandi. *Smith (Steven)*, 243 Mich App at 670-671. Therefore, when the proponent is seeking admission of other acts evidence based on a *modus operandi theory to establish identity*, the trial court should employ the test enunciated in *Golochowicz*, 413 Mich at 309. See *VanderVliet, supra* at 66.

Before the other acts evidence may be admitted pursuant to *Golochowicz*, "(1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act and, in light of the slightly different language of MRE 404(b) we add, opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant's guilt

of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice." *Golochowicz, supra* at 309.

4. Examples of Application of MRE 404(b) and MCL 768.27

Establishing motive is a proper purpose for which similar acts evidence is admissible. MRE 404(b). Motive is "[s]omething, esp[ecially] willful desire, that leads one to act." Black's Law Dictionary (8th ed). See also *People v Hoffman*, 225 Mich App 103, 106 (1997).

Where the prosecutor sought to establish the defendant's intent and absence of mistake by introducing evidence that other infants in the defendant's care had suspicious injuries, it was error for the trial court to prohibit the evidence as impermissible character evidence under MRE 404(b). *People v Martzke*, 251 Mich App 282, 292 (2002).

A defendant accused of criminal sexual conduct may introduce testimony under MRE 404(b) to show that the complainant's father previously induced him to make false allegations of sexual abuse against other persons disliked by the father. *People v Jackson (Nicholas)*, 477 Mich 1019 (2007). See also *People v Parks*, 478 Mich 910 (2007), where the Court remanded the case for an evidentiary hearing at which the defendant was to be given "the opportunity to offer proof that the complainant made a prior false accusation of sexual abuse against another person." *Parks, supra* at 910.

Prior acts may be admissible under MRE 404(b) when they are offered to show opportunity, scheme, or plan. *Smith (Anthony)*, 282 Mich App at 195. In *Smith (Anthony)*, the defendant was convicted of two counts of CSC-I and one count of CSC-II against his daughter when she was 10 or 11 years old. Specifically, on two occasions, the defendant entered the victim's bedroom, pulled down her pants and underwear, and penetrated her vagina with his penis. *Smith (Anthony), supra* at 193. Under MRE 404(b)(1) (and presumably MCL 768.27), the trial court admitted testimony from the victim's stepsister that she lived with the defendant when she was 11 or 12 years old, and that the defendant exposed his penis to her on three occasions during that time. *Smith (Anthony), supra* at 193-194. The Court of Appeals held that the trial court did not abuse its discretion in admitting evidence of the defendant's prior acts of indecent exposure. *Id.* at 197-198. Relying on *People v Sabin*

(After Remand), 463 Mich 43 (2000), the Court found that the evidence was offered for the proper purposes of showing opportunity, scheme, or plan. *Smith (Anthony), supra* at 197. The Court also found that while "[t]he evidence was damaging to defendant . . . , [] MRE 403 seeks to avoid *unfair* prejudice, which was not shown here." *Smith (Anthony), supra* at 198.

Where a defendant was charged with sexually abusing his daughter, the trial court erred in admitting evidence of the defendant's alleged sexual misconduct involving a coworker, because "the workplace acts and their contextual circumstances [were] not remotely similar to the charged conduct and [did] not support any inference that defendant's charged conduct was part of a common plan." *Pattison*, 276 Mich App at 617. In *Pattison*, the defendant was charged with four counts of first-degree criminal sexual conduct for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. *Pattison, supra* at 615. However, the alleged sexual misconduct toward the defendant's coworker was not admissible because there was no evidence of a "personal or familial relationship" between the defendant and his coworker. *Id.* at 617. Furthermore, the workplace incident involved "surprise, ambush, and force," while the defendant's conduct toward his daughter involved "manipulation and parental authority." *Id.*

5. Examples of Application of MCL 768.27a and MCL 768.27b

a. MCL 768.27a

Where some of the proposed testimony described conduct that constituted the commission of at least one of the offenses to which MCL 768.27a applied, the Court found the evidence "plainly relevant" to the likelihood that the defendant committed the charged offenses, and therefore, admissible under MCL 768.27a. *Watkins*, 277 Mich App at 364-365. Although the witness's testimony was inadmissible under MRE 404(b) because of the dissimilarities between the defendant's conduct with her and the defendant's conduct with the victim, similarity is not a consideration under MCL 768.27a. *Watkins, supra* at 365.

Evidence that the defendant previously committed the crime of attempted CSC-I against another minor was deemed admissible for any relevant reason under MCL 768.27a at the defendant's subsequent trial for criminal

sexual conduct with two other minors. *People v Mann (Jacob)*, 288 Mich App 114, 118 (2010). In *Mann (Jacob)*, "[t]he challenged evidence was relevant because it tended to show that it was more probable than not that the two minors in [the current] case were telling the truth when they indicated that [the defendant] had committed CSC offenses against them." *Mann (Jacob), supra* at 118. In addition, the evidence tended to make the likelihood of the defendant's behavior in the current case more probable. *Id.* Finally, "the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice" because whether the victims were telling the truth was significantly probative of whether the defendant should be convicted. *Id.*

b. MCL 768.27b

MCL 768.27b allows for admission of prior acts of domestic violence evidence at trial "as long as the evidence satisfies the 'more probative than prejudicial' balancing test of MRE 403[.]" *Cameron*, 291 Mich App at 610. To make this determination, the court must first decide whether introduction of the evidence would be unfairly prejudicial, then "'weigh the probativeness or relevance of the evidence' against the unfair prejudice." *Cameron, supra* at 611, quoting *People v Fisher*, 449 Mich 441, 452 (1995). In *Cameron, supra* at 605, the trial court admitted evidence of the defendant's prior abusive conduct towards the victim and another ex-girlfriend. Under the first inquiry, the Court of Appeals found that the admitted evidence "did not stir such passion as to divert the jury from rational consideration of [the defendant's] guilt or innocence of the charged offenses[,]" and that "the trial court minimized the prejudicial effect of the bad-acts evidence by instructing the jury that the issue in the case was whether [the defendant] committed the charged offense." *Id.* at 611-612. Under the second inquiry, the Court found that the evidence was relevant (1) to establish the victim's credibility, (2) to show that the defendant acted violently toward the victim and that his actions were not accidental, and (3) to show the defendant's propensity to commit acts of violence against women who were, or had been romantically involved with him. *Cameron, supra* at 612. The Court concluded that "[the defendant's] prior bad acts were relevant to the prosecutor's domestic violence charge under MCL 768.27b[,]" and that "[a]ny prejudicial effect of admitting the bad-acts evidence did not substantially outweigh the

probative value of the evidence[.]" *Id*. Accordingly, "the trial court did not abuse its discretion when it allowed [the defendant's] prior-bad-acts evidence to be introduced under MCL 768.27b." *Id*. See also *People v Meissner*, ___ Mich App ___, ___ (2011) (the defendant's "prior acts of domestic violence[, although different from the charged offense,] illustrated the nature of [the] defendant's relationship with [the victim] and provided information to assist the jury in assessing her credibility").

In *Pattison*, 276 Mich App at 615, the defendant was charged with four counts of first-degree criminal sexual conduct for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. In an interlocutory appeal, the Court of Appeals affirmed the trial court's order allowing the prosecutor to introduce evidence of the defendant's other alleged sexual assaults against his ex-fiancee (which constituted domestic violence under MCL 768.27b). *Pattison, supra* at 615-616. However, rather than reviewing the evidence's admissibility under MRE 404(b), as did the trial court, the Court of Appeals relied on MCL 768.27b[13] in making its determination. *Pattison, supra* at 615-616. The Court concluded that evidence of first-degree criminal sexual conduct against the defendant's ex-fiancee was admissible under MCL 768.27b because the evidence was "probative of whether he used those same tactics to gain sexual favors from his daughter." *Pattison, supra* at 616. Having found the evidence admissible under MCL 768.27b, the Court did not review the evidence's admissibility under MRE 404(b). *Pattison, supra* at 616.

Where the proposed testimony of a defendant's previous acts of domestic violence is highly relevant to the defendant's tendency to commit the crime at issue, it may be admissible under MCL 768.27b. *People v Railer*, 288 Mich App 213, 220-221 (2010). In *Railer, supra* at 220, the prosecution was permitted to call the defendant's former girlfriends to testify about the defendant's threats and physical abuse during their respective relationships with him. The Court concluded that their testimony described "behavior [that] clearly meets the definition of 'domestic violence' under [MCL 768.27b], [behavior that] occurred within ten years of the charged offense as required by

[13] MCL 768.27b permits trial courts to "admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Pattison*, 276 Mich App 613, 615 (2007).

[MCL 768.27b(4)], and [behavior that] would be highly relevant to defendant's tendency to assault [the victim] as charged." *Railer, supra* at 220.

6. Notice Requirement

a. MRE 404(b)(2)

MRE 404(b)(2) provides in relevant part:

> "The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1),[14] for admitting the evidence."

The reasons for the notice requirement are: "(1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record." *People v Hawkins*, 245 Mich App 439, 454-455 (2001).

b. MCL 768.27a

MCL 768.27a, which governs the admissibility of evidence of sexual offenses against minors in criminal cases, requires the prosecuting attorney to disclose evidence admissible under that statute to the defendant "at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered."

c. MCL 768.27b

MCL 768.27b, which governs the admissibility in criminal cases of evidence of other acts of domestic violence committed by a defendant, requires the prosecuting

[14] Proof of notice, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material.

attorney to disclose evidence admissible under this statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

2.3 Habit or Routine Practice

A. Rule

MRE 406 states:

> "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

B. Requirements

Habit or routine practice evidence is generally admissible to demonstrate comparable conduct on the occasion in question. *People v Unger*, 278 Mich App 210, 227 (2008). In *Unger*, evidence of the victim's lifelong fear of the dark, including the fact that she routinely avoided being alone in the dark, was admissible to rebut the defendant's claims that the victim's death occurred after he left her alone in the dark at their boathouse deck. *Unger, supra* at 227. The Court stated that "a rational jury could have concluded that the victim would not have voluntarily stayed on the boathouse deck alone after dark and that defendant had therefore fabricated his account of the events leading up to the victim's death." *Id.*

Evidence of habit or routine practice must demonstrate a pattern, establish that the action was standard practice, or that the action was executed innumerable times. *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 256 (1982). The testifying witness must have known about the routine procedure prior to testifying and must understand the steps involved in the practice. *Laszko, supra* at 256.

2.4 Prior Accidents

Evidence of prior accidents is admissible to show a defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident.[15] *Freed v Simon*, 370 Mich 473, 475 (1963). This

evidence may also be used to show that the defendant was negligent since he or she had notice or knowledge of the defect and should be "held to a higher degree of care by reason of his [or her] notice of such dangerous condition than he [or she] otherwise would be." *Freed, supra* at 475. Evidence of a prior similar accident that occurred in the same place at issue is also admissible to show that a defect or dangerous condition in fact existed. *Id.* "The requisite foundation for such admissibility is a showing of similarity of conditions and reasonable proximity in time." *Maerz v United States Steel Corp*, 116 Mich App 710, 723 (1982), citing *Freed, supra* at 475.

2.5 Subsequent Remedial Measures

MRE 407 states:

> "When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

In *Denolf v Frank L Jursik Co*, 395 Mich 661, 667 (1976), the Court stated that MRE 407 "is primarily grounded in the policy that owners would be discouraged from attempting repairs that might prevent future injury if they feared that evidence of such acts could be introduced against them." However, evidence of subsequent repairs may be admissible if the following criteria are met:

> "(1) evidence of subsequent remedial action is otherwise relevant, (2) admission of the evidence would not offend policy considerations favoring encouragement of repairs, and (3) the remedial action is not undertaken at the direction of a party plaintiff so that it does not constitute a self-serving, out-of-court declaration by that party." *Denolf, supra* at 669-670.

2.6 Settlements and Settlement Negotiations

MRE 408 states:

[15] See Section 4.4 on negative evidence.

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

Evidence of a settlement made by a party with a nonparty is inadmissible to prove liability. *Windemuller Elec Co v Blodgett Mem Med Ctr*, 130 Mich App 17, 23 (1983). In *Windemuller*, the Court found that admitting evidence of a settlement between the plaintiff and a third party constituted prejudicial error where the evidence went to a substantive issue in the case (the plaintiff's liability). *Windemuller, supra* at 24. However, where a defendant-insurance agency "was not a party to the settlement or any part of the settlement process, and it was involved only to the extent of giving its approval pursuant to plaintiffs' policy, which explicitly excluded . . . coverage 'to any person who settles a bodily injury claim without [defendant's] written consent[,]" evidence of its consent is not barred by MRE 408. *Chouman v Home-Owners Ins Co*, ___ Mich App ___, ___ (2011). In *Chouman, supra* at ___, the Court found that the defendant's consent "was [not], itself, a compromise of a dispute [that] defendant had with any party or non-party[]" and thus, not subject to exclusion under MRE 408.[16]

"Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried." *Oesterle v Wallace*, 272 Mich App 260, 264 (2006). The Court of Appeals concluded that this absolute privilege applies to statements made during the course of settlement negotiations where the statement is made after the commencement of and in context of the present litigation. *Oesterle, supra* at 261, 268. However, MRE 408 is not limited to precluding evidence of settlements and settlement negotiations in only the present litigation; it can also act to preclude such evidence from other cases when the evidence is relevant to the present litigation. See *Alpha Capital Management, Inc v Rentenbach*, 287 Mich App 589, 621 (2010), where the

[16] Ultimately, the *Chouman* Court concluded that this evidence was inadmissible under MRE 401 and MRE 403. *Chouman*, ___ Mich App at ___.

Court of Appeals concluded that "[t]he trial court incorrectly determined that MRE 408 lacks applicability to settlements 'in another case,' because the rule plainly does not take into account a 'prior action' exception."

2.7 Medical Expenses

MRE 409 states:

> "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."

2.8 Plea Discussions

Generally, the following pleas and statements are inadmissible, in any civil or criminal proceeding, against a defendant who made the plea or participated in the plea discussions:

> (1) A guilty plea that was later withdrawn. MRE 410(1).
>
> (2) A nolo contendere plea. However, "to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea[.]" MRE 410(2).
>
> (3) Any statement made during plea proceedings pursuant to either "MCR 6.302 or comparable state or federal procedure regarding either [guilty or nolo contendere] pleas." MRE 410(3).
>
> (4) Any statement made during plea discussions with a prosecutor "which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." MRE 410(4).

However, the preceding pleas and statements are admissible "(*i*) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (*ii*) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel." MRE 410.

A defendant may waive the protections provided by MRE 410, "as long as [he or she is] appropriately advised and as long as the statements admitted into evidence are voluntarily, knowingly, and understandingly made." *People v Stevens*, 461 Mich 655, 668-669 (2000).

2.9 Statements Made to Individual or Individual's Family Involved in Medical Malpractice Actions

"A statement, writing, or action that expresses sympathy compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual and that is made to that individual or to the individual's family is inadmissible as evidence of an admission of liability in an action for medical malpractice." MCL 600.2155.

For purposes of MCL 600.2155, an individual's "family" includes the person's spouse, parent, grandparent, stepparent, child, adopted child, grandchild, sibling, half sibling, father-in-law, or mother-in-law. MCL 600.2155(3).

"[S]tatement[s] of fault, negligence, or culpable conduct that [are] part of or made in addition to a statement, writing, or action described in [MCL 600.2155(1)]" are not precluded from admission by MCL 600.2155(1). MCL 600.2155(2).

2.10 Insurance Coverage

MRE 411 states:

> "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness."

See also MCL 500.3030, which precludes reference, during the course of a trial, to the insurer or the question of carrying insurance except as otherwise provided by law.

> "It has been repeatedly held that it is reversible error to intentionally interject the subject of insurance if the sole purpose is to inflame the passions of the jury so as to increase the size of the verdict. On the other hand, it is not reversible error if the subject is only incidentally brought into the trial, is only casually mentioned, or is used in good faith for purposes other than to inflame the passions of the jury." *Cacavas v Bennett*, 37 Mich App 599, 604 (1972) (internal citations omitted).

"References to the insurance coverage of either party during voir dire is presumptively improper. However, this presumption may be rebutted

and any error regarded as harmless." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 411 (1994) (internal citations omitted), abrogated on other grounds *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004). Offending counsel must overcome, "by a persuasive showing, a presumption that his [or her] remarks were prejudicially improper." *Kokinakes v British Leyland, Ltd*, 124 Mich App 650, 652-653 (1983).

2.11 Polygraph

A. Polygraph Results Generally Inadmissible

Evidence that a polygraph examination was taken or the results of a polygraph examination are not admissible at trial. *People v Kahley*, 277 Mich App 182, 183 (2007). However, a court may use the results of a polygraph examination "to help determine whether to grant a post-conviction motion for a new trial." *People v Barbara*, 400 Mich 352, 412 (1977).

The mere mention of a polygraph test may not require a mistrial. *People v Nash*, 244 Mich App 93, 98 (2000). The following factors should be considered in determining whether or not mention of a polygraph is ground for a mistrial:

> "[The c]ourt should consider: (1) whether [the] defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." *People v Rocha*, 110 Mich App 1, 9 (1981).

1. Mention of Polygraph Required Reversal

When, during a bench trial, the prosecutor mentioned a defendant's polygraph examination, a copy of which was filed with the court, and the judge questioned the officer regarding the number of polygraph tests he had performed in the past, the conviction was reversed because the prosecutor's injection of the polygraph testing and results was unfairly prejudicial to the defendant's case, even though the trial court found it had not been influenced by this information. *People v Smith (Kerry)*, 211 Mich App 233, 234-235 (1995). The Court of Appeals concluded that this was unfairly prejudicial "because it provided supposedly scientific evidence of defendant's lack of credibility." *Smith (Kerry), supra* at 235.

In *People v Nash*, 244 Mich App 93, 95 (2000), the prosecution's key witness mentioned taking a polygraph test during direct examination. The Court found that this reference seriously affected the fairness of the trial and ordered a reversal. *Nash, supra* at 101. The Court stated,

> "Where the reference to the polygraph test was brought out by the prosecutor, not as a matter of defense strategy, and where the key prosecution witness, who was involved in the crime and was the crucial witness against the defendant, gave a responsive answer to the prosecutor's question that was posed with the intent of bolstering the witness'[s] credibility and was later repeated before the jury during deliberations, we believe that prejudice to [the] defendant occurred." *Id.*

2. Mention of Polygraph Did Not Require Reversal

A witness's reference to conducting a "specialized interview" with the defendant was not considered improper or inadmissible because there was no specific reference to the fact that the interview was in fact a polygraph examination. *People v Triplett*, 163 Mich App 339, 342-344 (1987), remanded on other grounds 432 Mich 568 (1989). In addition, another witness's testimony that was interrupted mid-sentence by the court before the witness could mention the polygraph results was neither improper nor inadmissible because there was no specific reference to the fact that the defendant had failed the polygraph examination. *Triplett, supra* at 342-344.

A police officer's testimony that the defendant refused to take a polygraph examination did not require reversal because the officer's reference was singular and brief; the prosecutor did not argue that the defendant's failure to take a polygraph examination was evidence of the defendant's guilt; the defendant himself testified that he asked to take a polygraph test but was never given one; and the defendant confessed to the crime. *People v Kahley*, 277 Mich App 182, 183-184 (2007).

B. Cautionary Instruction

If evidence of a polygraph test is admitted or improper argument is made about it, the court should immediately instruct the jury to disregard the evidence and inform the jury of the unreliability of such tests. See *People v Ranes*, 63 Mich App 498, 501-502 (1975).

C. Exceptions: Motions for New Trial and to Suppress Evidence

Polygraph results may be admissible in support of a motion for new trial. *People v Barbara*, 400 Mich 352, 412 (1977). In addition, the court has discretion to admit polygraph results in support of a motion to suppress illegally seized evidence. *People v McKinney*, 137 Mich App 110, 114-117 (1984). In exercising its discretion to decide whether to admit polygraph evidence during a postconviction hearing for a new trial or in support of a motion to suppress, the evidence must meet the following conditions:

> (1) the results are offered on the defendant's behalf;
>
> (2) the test was taken voluntarily;
>
> (3) the professional qualifications of the polygraph examiner must be approved;
>
> (4) the quality of the polygraph equipment must be approved;
>
> (5) the procedures employed must be approved;
>
> (6) either the prosecutor or the court may obtain an independent examination of the subject by an operator of the court's choice, or the independent operator is permitted to review the original data with the original operator, or both;
>
> (7) the results must be considered only with regard to the general credibility of the subject;
>
> (8) any affidavits or testimony by the test operator must be a separate record and must not be used at a subsequent trial; and
>
> (9) the judge granting a new trial may not sit as trier of fact in the new trial. However, he or she may preside in a subsequent jury trial. A substitute judge can have no knowledge of the polygraph examination or its results. *McKinney*, *supra* at 117, citing *People v Barbara*, 400 Mich 352, 412-413 (1977).

D. Right to Counsel

A defendant has the right to have counsel present during a polygraph examination if the examination occurs after the Sixth Amendment right to counsel has attached. *People v Leonard*, 125

Mich App 756, 759 (1983).[17] However, a defendant may waive the right to have counsel present at a polygraph examination. *Wyrick v Fields*, 459 US 42 (1982). See also *McElhaney*, 215 Mich App at 274-277.

E. Defendant's Right to Polygraph

A defendant accused of committing a criminal sexual conduct offense has the right to request a polygraph examination. MCL 776.21(5) states:

> "A defendant who allegedly has committed a crime under [MCL 750.520b to 750.520e and 750.520g], shall be given a polygraph examination or lie detector test if the defendant requests it."[18]

A defendant's statutory right to a polygraph examination under MCL 776.21(5) does not include the right to have the examination tape-recorded. *People v Manser*, 250 Mich App 21, 32 (2002), overruled on other grounds 482 Mich 540 (2008). Furthermore, information that a defendant did not receive a tape-recorded polygraph is not admissible at trial because it is "not relevant to any material fact but only to a collateral legal matter[.]" *Manser, supra* at 32.

The defendant's statutory right to a polygraph examination applies at any time during the pretrial and trial process until a verdict is rendered. *People v Phillips (Keith)*, 469 Mich 390, 395-396 (2003). The Court stated, "Because the statute does not otherwise provide for a time limit within which to exercise the right, under the clear and unambiguous language of MCL 776.21(5), the right is lost only when the presumption of innocence has been displaced by a finding of guilt, i.e., when an accused is no longer 'alleged' to have committed the offense." *Phillips (Keith), supra* at 396. In *Phillips (Keith)*, the defendant asserted his right to a polygraph examination during jury deliberations, and the Supreme Court concluded that his motion was timely because "he was still alleged to have committed the offense." *Id.* However, failure to grant a defendant's timely request may not require a new trial where the error was not outcome determinative. *Phillips (Keith), supra* at 396-397. Here, the trial court's error in failing to order a polygraph examination at the

[17] Although a defendant's attorney is not allowed in the examination room, the defendant has the right to stop the examination at any time to consult with the attorney. See *People v McElhaney*, 215 Mich App 269, 274 (1996).

[18] If a defendant exercises this right, and the polygraph results indicate that he or she may not have committed the crime, a law enforcement officer (as defined in MCL 776.21(1)(a)) must inform the victim (as defined in MCL 776.21(1)(b)). MCL 776.21(3).

defendant's request was not outcome determinative, where the victim told police that the defendant committed the crime, the defendant confessed to committing the crime, any favorable polygraph results would not have been admissible, and the defendant's request was made after the close of proofs, making the test results immaterial to his defense. *Id.* at 397.

F. Polygraph Examiners Privilege

There is a statutory privilege that applies to polygraph examiners. MCL 338.1728. Information obtained by a polygraph examiner during an examination conducted at the request of an attorney is subject to the attorney-client privilege. *In Re Petition of Delaware (People v Marcy)*, 91 Mich App 399, 406-407 (1979).

Chapter 3: Witnesses, Opinions, & Expert Testimony

3.1 Witness Disclosure

A. Civil Case

1. Witness List

"Witness lists are an element of discovery." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628 (1993). They serve the purpose of avoiding "'trial by surprise.'" *Grubor, supra*, quoting *Stepp v Dep't of Nat Resources*, 157 Mich App 774, 778 (1987).

The parties must file and serve their witness lists within the time limits prescribed by the court in MCR 2.401(B)(2)(a). MCR 2.401(I)(1). The witness list should include the witness's name, address (if known), whether the witness is an expert, and his or her field of expertise. MCR 2.401(I)(1)(a)–MCR 2.401(I)(1)(b). However, only a general identification is necessary if the witness is a records custodian "whose testimony would be limited to providing the foundation for the admission of records[.]" MCR 2.401(I)(1)(a).

2. Sanction for Failure to File Witness List

"The court may order that any witness not listed in accordance with [MCR 2.401] will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). "While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate." *Dean v Tucker*, 182 Mich App 27, 32 (1990). Just because a witness list was not timely filed does not in and of itself justify the imposition of such a sanction. *Dean, supra* at 32. In *Dean, supra* at 32-33, the Court created a nonexhaustive list of factors to consider when determining an appropriate sanction:

> "(1) whether the violation was [willful] or accidental;
>
> "(2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);
>
> "(3) the prejudice to the [other party];
>
> "(4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice;
>
> "(5) whether there exists a history of [the party] engaging in deliberate delay;
>
> "(6) the degree of compliance by the [party] with other provisions of the court's order;
>
> "(7) an attempt by the [party] to timely cure the defect; and

> "(8) whether a lesser sanction would better serve the interests of justice."

"Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses." *Pastrick v Gen Tel Co of Michigan*, 162 Mich App 243, 245 (1987). The court may impose reasonable conditions on allowing the testimony of an undisclosed witness if there is no prejudice to the opposing party. *Pastrick, supra* at 246. In *Pastrick*, the Court of Appeals concluded that the trial court employed reasonable conditions in allowing the prosecutor's undisclosed rebuttal witness to testify by giving the "defendants an opportunity to interview the undisclosed witness and to secure their own experts[.]" *Id.* The Court also noted that a reasonable condition will also normally include a reasonable time frame. *Id.* at 247 n 1.

B. Criminal Case

Upon request, a party must provide all other parties with the names and addresses of any lay or expert witnesses that may be called at trial. MCR 6.201(A)(1).[1] Alternatively, the party may provide the other party with the witness's name and make the witness available for interview. *Id.* "[T]he witness list may be amended without leave of the court no later than 28 days before trial[.]" *Id.*

If a party violates the discovery rules in MCR 6.201, the court has discretion to "order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." MCR 6.201(J). If the court finds that an attorney willfully violated MCR 6.201 or a discovery order, it may subject the attorney to any of the sanctions listed in MCR 6.201(J).

Where the prosecution's failure to disclose a transcript of a witness's prior statements, given pursuant to an investigative subpoena, violated MCR 6.201(A)(2) but did not implicate the defendant's right to due process, the remedy fashioned by the trial court—precluding the prosecution from questioning the witness regarding the statements and allowing defense counsel to review the transcript before cross-examining the witness—did not constitute an abuse of discretion. *People v Jackson (Andre)*, ___ Mich App ___, ___ (2011).

[1] MCR 6.201 applies only to felony cases. See MCR 6.001(A) and *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 450 n 6 (2006).

Duties of Prosecuting Attorney. A prosecutor has a statutory duty to disclose any potential witnesses, including res gestae witnesses, on the filed information. MCL 767.40a(1). If additional res gestae witnesses become known, the prosecutor must continue to disclose their names. MCL 767.40a(2). A prosecutor must send the defendant the prosecutor's witness list no less than 30 days before trial. MCL 767.40a(3).

3.2 Exclusion of Witness

A. Exclusion of Witness

On its own motion or at the request of a party, "the court may order witnesses excluded so that they cannot hear the testimony of other witnesses[.]" MRE 615. A party who is a natural person, a non-natural party's representative, or an essential person may not be excluded. MRE 615.

A victim of a crime has the right to attend the trial related to that crime. Const 1963, art 1, § 24. However, if the victim is a witness, the court may, for good cause, sequester the victim until he or she first testifies. MCL 780.761; MCL 780.789 (juvenile proceedings). The victim may not remain sequestered once he or she testifies. MCL 780.761; MCL 780.789.

B. Violation

"[T]rial courts have discretion to order sequestration of witnesses and discretion in instances of violation of such an order to exclude or to allow the testimony of the offending witness." *People v Nixten*, 160 Mich App 203, 209-210 (1987). However, excluding a witness's testimony for violating a sequestration order "is an extreme remedy that should be sparingly used." *People v Meconi*, 277 Mich App 651, 654 (2008). In *Meconi*, the trial court abused its discretion by excluding the victim's testimony because she violated the sequestration order when the violation "resulted from an innocent mistake[,]" and the victim "only heard short opening statements, not testimony[.]" *Meconi, supra* at 654-655.

Committee Tip:

The court may consider the following responses to a violation of a sequestration order:

- *Permit the violation to reflect on credibility;*
- *Preclude the witness's testimony;*

- *Strike the witness's testimony;*
- *Cite the witness for contempt if the violation was purposeful; or*
- *Declare a mistrial.*

3.3 Competency of Witness[2]

All witnesses are presumed to be competent to testify. *People v Watson*, 245 Mich App 572, 583 (2001). To be competent, the witness must have "the capacity and sense of obligation to testify truthfully and understandably." *Watson, supra* at 583. See also MRE 601, which states:

> "Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules."

3.4 Child Witness

A. Competency[3]

Under MRE 601, a child is competent to testify as a witness unless the court finds otherwise, or he or she is precluded from testifying by the rules of evidence. When a child witness testifies, the following jury instruction may be appropriate:

> "For a witness who is a [young] child, a promise to tell the truth takes the place of an oath to tell the truth." CJI2d 5.9.

B. Confrontation

The use of contemporaneous closed-circuit testimony is constitutional when the court determines that it is necessary to further an important public policy. *Maryland v Craig*, 497 US 836, 845 (1990).

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[2] For information on the competency of a child witness, see Section 3.4(A).

[3] Effective August 3, 1998, MCL 600.2163 was repealed, and Michigan courts are no longer required to question a child witness regarding competency.

> "The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.*, more than 'mere nervousness or excitement or some reluctance to testify[.]' *Craig, supra* at 855-856.

MCL 600.2163a(17), a statute permitting special arrangements (such as testimony via videotape) for the testimony during certain types of proceedings of child victims and impaired persons who are victims, has been found to satisfy the *Craig* requirements. *People v Pesquera,* 244 Mich App 305, 310-312 (2001).

The same considerations given to permitting testimony via closed-circuit television are applicable "to determine whether a trial court infringes a defendant's right of confrontation when it allows witness testimony to be taken through two-way, interactive video technology." *People v Buie (Buie I)*, 285 Mich App 401, 415 (2009). "The trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all of the other elements of the Confrontation Clause," i.e., oath, cross-examination, and the opportunity for the trier of fact to observe the witness's demeanor. *Buie I*, *supra* at 415. In *Buie I*, *supra* at 406-407, the trial court permitted a doctor and a DNA expert to testify at trial via two-way interactive video technology. The Court of Appeals remanded the case because the record was silent as to evidence or trial court findings that the video-conferencing procedure was necessary, and what important public policy or state interest was being furthered. *Id*. at 416. On remand, the trial court held that "there was no error in permitting the video procedure because it furthered several state interests or public policies and [the] defendant consented to the procedure." *People v Buie (Buie II) (After*

Remand), 291 Mich App 259, 262 (2011). However, the Court of Appeals disagreed and found that the trial court failed to "explain how the particular interests it cited, i.e., cost savings, efficiency, the convenience of the witnesses, and avoiding delay, constituted public policies or state interests important enough to outweigh [the] defendant's right to confrontation under the *first* prong of the *Craig*[4] test[,]" and, in addition, "neither party appear[ed] to agree with the trial court's conclusion on this issue[.]" *Buie II, supra* at 270. Accordingly, the Court declined to hold that a public policy or state interest existed that outweighed the defendant's right of confrontation, and found that the use of two-way interactive technology violated the defendant's right of confrontation. *Id*. at 271.[5]

C. Sexual Act Evidence

Although the common-law "tender years" exception to the hearsay rule did not survive the adoption of the original Michigan Rules of Evidence, it was reinstated with the adoption of MRE 803A. In criminal and delinquency proceedings only,[6] a child's statement regarding sexual acts performed on or with the declarant is admissible, provided it corroborates the declarant's testimony during the same proceeding and:

> "(1) the declarant was under the age of ten when the statement was made;
>
> "(2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> "(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

[4] *Craig*, 497 US 836, requiring a trial court to "[(1)] hear evidence and make case-specific findings that the use of [two-way, interactive video] technology procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation, and [(2)] that it preserves all of the other elements of the Confrontation Clause." *Buie II*, 291 Mich App at 269.

[5] The Court of Appeals also reviewed the trial court's findings that the video procedure was permissible under MCR 6.006(C)(2), and concluded that there was no showing of consent by the defendant, as required by the court rule. *Buie II,* 291 Mich App at 272. Therefore, the trial court plainly erred in allowing the witnesses to testify using the video procedure. *Buie II, supra* at 274. Because the trial court plainly erred in permitting the witnesses to testify at trial by way of two-way, interactive video technology, and permitting the video procedure did not constitute harmless error, the Court vacated the defendant's convictions and sentence. *Id.* at 276.

[6] See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A.

> "(4) the statement is introduced through the testimony of someone other than the declarant." MRE 803A(1)–MRE 803A(4).

Only the declarant's first corroborative statement is admissible under MRE 803A. However, a statement that is inadmissible under MRE 803A because it is a subsequent corroborative statement is not precluded from being admitted via another hearsay exception. *People v Katt*, 468 Mich 272, 294-297 (2003) (the statement was admissible under MRE 803(24), a residual hearsay exception).

The proponent of the MRE 803A statement must notify the adverse party of his or her "intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement." MRE 803A.

D. Custody Proceedings

The scope of an in camera interview of a child is limited to determining the child's preference and should not cover other best interest of the child factors. *In re HRC*, 286 Mich App 444, 451-452 (2009); MCR 3.210(C)(5). See also *Molloy v Molloy (Molloy II)*, 247 Mich App 348, 351 (2001), vacated in part on other grounds 466 Mich 852 (2002). In camera interviews with children need not be recorded. *Molloy v Molloy (Molloy III)*, 466 Mich 852 (2002).

The rules of evidence do not apply to in camera proceedings regarding a child's custodial preference. MRE 1101(b)(6).

In child custody proceedings, a trial court must take testimony in open court on any issues regarding a child's abuse or mistreatment. *Surman v Surman*, 277 Mich App 287, 302 (2007). According to the *Surman* Court:

> "[A]lthough courts should seek to avoid subjecting children to the distress and trauma resulting from testifying and being cross-examined in court, concerns over the child's welfare are outweighed when balanced against a parent's due process rights." *Id.* at 302.[7]

[7] See Section 3.4(B) on using closed-circuit television as a means to protect a child from the trauma of courtroom testimony and/or the defendant's presence in the courtroom.

3.5 Examination & Cross-Examination

A. Direct Examination

Generally, in a civil case, the plaintiff must introduce its testimony first, unless otherwise ordered by the court. MCR 2.507(B). However, a defendant must present his or her evidence first if:

> "(1) the defendant's answer has admitted facts and allegations of the plaintiff's complaint to the extent that, in the absence of further statement on the defendant's behalf, judgment should be entered on the pleadings for the plaintiff, and
>
> "(2) the defendant has asserted a defense on which the defendant has the burden of proof, either as a counterclaim or as an affirmative defense." *Id*.

Leading questions are only permissible on direct examination as "necessary to develop the witness'[s] testimony." MRE 611(d)(1). See *In re Susser Estate*, 254 Mich App 232, 239-240 (2002), where reversal was not required when the plaintiff asked leading questions of an elderly and infirm witness only to the extent necessary to develop her testimony.

Only one attorney for a party is permitted to examine a witness, unless otherwise ordered by the court. MCR 2.507(C).

B. Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(c). However, the trial court may limit cross-examination regarding matters not testified to on direct examination. *Id*. See, e.g., *Beadle v Allis*, 165 Mich App 516, 522-523 (1987), where the trial court did not abuse its discretion in limiting the plaintiff's cross-examination of the defendant's expert witness about issues that were "marginally relevant to the case as a whole but which [were] beyond the scope of the witness'[s] testimony on direct examination."

Leading questions are permissible during cross-examination. MRE 611(d)(2). However, the court is not always required to allow them. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 517-518 (2004).

The adverse party statute (MCL 600.2161) allows a party to "call[] the opposite party, or his agent or employee, as a witness with the same privileges of cross-examination and contradiction as if the

opposite party had called that witness." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 26 (2005). Neither MRE 611 nor MCL 600.2161 is violated if the court, in exercising its discretion under MRE 611(a), requires the cross-examination of the adverse party during the adverse party's case-in-chief. *Linsell, supra* at 26.

A cross-examining attorney must accept the answer given by a witness regarding any collateral matters. *People v Vasher*, 449 Mich 494, 504 (1995). However, impeachment may be proper when the collateral matter "'closely bear[s] on [the] defendant's guilt or innocence.'" *Vasher, supra* at 504.

C. Redirect Examination

The scope of redirect examination is left to the discretion of the trial court. *Gallaway v Chrysler Corp*, 105 Mich App 1, 8 (1981). "In general, redirect examination must focus on matters raised during cross-examination." *Gallaway, supra* at 8. However, "this general rule does not equate to an entitlement to elicit any and all testimony on such topics. Rather, the rules of evidence, which require that 'questions concerning . . . the admissibility of evidence shall be determined by the court,' continue to apply regardless of whether the questioning at issue is properly within the scope of examination." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291 (2006).

D. Recross-Examination

Generally, recross-examination is governed by the same principles as cross-examination. See *People v Eddie Jackson*, 108 Mich App 346, 348-349 (1981).

On recross-examination, the parties may inquire into new matters not covered during cross-examination where the new matters are in response to matters introduced during redirect examination. *People v Goddard*, 135 Mich App 128, 138 (1984), rev'd on other grounds 429 Mich 505 (1988).

E. Nonresponsive Answer

A volunteered and nonresponsive answer to a proper question generally does not warrant granting a motion for a mistrial. *People v Haywood*, 209 Mich App 217, 228 (1995). However, a police officer has a special obligation not to testify about forbidden matters which may prejudice the defense. *People v Holly*, 129 Mich App 405, 415-416 (1983). In *Holly*, the defendant was convicted of armed robbery, and he claimed that he only participated in the robbery because he was afraid of his codefendant. *Holly, supra* at 416. During the trial, a

police officer gave a nonresponsive answer that implicated the defendant in other armed robberies, thereby substantially reducing the credibility of the defense's theory. *Id.* The Court concluded that the officer's testimony was prejudicial, but it did not reverse the defendant's conviction because the other evidence against him was sufficient to support his conviction. *Id.*

3.6 Impeachment of Witness—Bias, Character, Prior Convictions, Prior Statements

A. Ways to Impeach a Witness

Subject to any conditions described in the applicable rules of evidence, there are four classic ways to impeach a witness:

- Interest or bias,[8] see MRE 611(c);
- Character or reputation for veracity,[9] MRE 608(a) (opinion and reputation evidence), and MRE 608(b) (evidence of specific instances of conduct);
- Prior conviction of a crime,[10] MRE 609; and
- Prior statements,[11] MRE 613, MRE 801(d)(1)(A), and MRE 806.

MRE 707 permits impeachment of an expert by use of a learned treatise, provided the treatise is "established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice[.]" If statements from a learned treatise are admitted to impeach an expert witness, they may not be received as exhibits but may be read into evidence. MRE 707.

B. Collateral Matters

> "It is a well-settled rule that a witness may not be impeached by contradiction on matters which are purely collateral. What is a collateral matter depends upon the issue in the case. . . . The purpose of the [collateral matters] doctrine is closely related to the goals of the prejudice rule, MRE 403, and generally the

[8] See Section 3.6(C).

[9] See Section 3.6(D).

[10] See Section 3.6(E).

[11] See Section 3.6(F) and Section 3.6(G).

> same factors which are employed to determine whether evidence is inadmissible under 403 are used to determine whether extrinsic evidence should be allowed for impeachment purposes." *Cook v Rontal*, 109 Mich App 220, 229 (1981) (internal citations omitted).

C. Witness Bias

The interest or bias of a witness has always been deemed relevant. *People v Layher*, 464 Mich 756, 764 (2001). The Michigan Supreme Court explained witness bias:

> "'Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his [or her] testimony in favor of or against a party. Bias may be induced by a witness'[s] like, dislike, or fear of a party, or by the witness'[s] self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness'[s] testimony.'" *Layher, supra* at 763, quoting *United States v Abel*, 469 US 45, 52 (1984).

Generally, the court has broad discretion to allow questioning designed to show bias, prejudice, or interest on the part of a witness. *Detroit/Wayne Co Stadium Authority v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 653 (2005). There is no specific rule of evidence that covers this form of impeachment, but MRE 401 (relevancy) and MRE 611 (mode of interrogation) seem applicable. Interest or bias is always relevant to a witness's credibility and MRE 611(c) states that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." *Layher*, 464 Mich at 764.

A trial court may allow inquiry into prior arrests or charges for the purpose of establishing witness bias where, in its sound discretion, the trial court determines that the admission of evidence is consistent with the safeguards of the Michigan Rules of Evidence. *Layher*, 464 Mich at 758. In *Layher* (a case involving criminal sexual conduct), the defendant's lead witness had been previously arrested for and acquitted of criminal sexual conduct charges. *Id.* at 760. The Court concluded that evidence of the witness's prior arrest was admissible because its admission "supports the inference that [the witness] would color his testimony in favor of [the] defendant." *Id.* at 765.

D. Character

Evidence of character is generally inadmissible to prove conduct. MRE 404.[12] However, MRE 404(a)(4) permits a witness's credibility to be attacked or supported through reputation testimony, opinion testimony, or inquiry into specific instances of conduct, as permitted by MRE 608, which states:

> "**(a) Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> "**(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'[s] credibility, other than conviction of crime as provided in [MRE] 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness'[s] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

1. MRE 608(a) Examples

It is error for a court to allow character testimony that goes "beyond [the witness's] reputation for truthfulness and encompasse[s] [the witness's] overall 'integrity.'" *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 102 (2009).

Where a party attacks a witness's credibility, but not the witness's character for truthfulness, the opposing party may not present evidence to bolster the witness's truthful character. *People v Lukity*, 460 Mich 484, 490-491 (1999). In *Lukity*, the defense counsel, during his opening statement, asserted that the complainant had emotional problems which affected her ability to describe the alleged sexual assaults. *Lukity, supra* at 490. Before the complainant testified, the trial court allowed

[12] See Section 2.2 on character evidence.

the prosecution to present testimony from several other witnesses as to the complainant's truthful character. *Id.* at 488-489. The Michigan Supreme Court concluded that the defendant's opening statement did not implicate MRE 608(a), and the trial court abused its discretion in admitting evidence of the complainant's truthful character where her truthful character had never been attacked. *Lukity, supra* at 491.

2. MRE 608(b) Examples

Although MRE 608(b) prohibits the admission of extrinsic evidence regarding specific instances of a witness's conduct, the rule clearly permits the cross-examination of the witness regarding matters such as an alleged false affidavit.

Where a witness was not called as a character witness and did not testify on direct examination about the plaintiff's truthfulness or untruthfulness, the defendant was not permitted to cross-examine the witness about specific instances of the plaintiff's conduct for the purpose of impeaching the plaintiff. *Guerrero v Smith*, 280 Mich App 647, 655 (2008). In *Guerrero*, the plaintiff testified about his limited marijuana use. *Guerrero, supra* at 654. Defense counsel cross-examined one of the plaintiff's witnesses in an effort to impeach the plaintiff's testimony regarding his marijuana use. *Id.* The Michigan Court of Appeals concluded that the witness's testimony should not have been admitted because it did not satisfy the technical requirements of MRE 608(b)(2). *Guerrero, supra* at 654. The Court stated:

> "Before specific instances concerning another witness's character for truthfulness or untruthfulness may be inquired into on cross-examination, the witness subject to cross-examination must already have testified on direct examination regarding the other witness's character for truthfulness or untruthfulness." *Id.* at 654-655.

E. Prior Conviction of a Crime

MRE 609 states:

> "**(a) General Rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or

established by public record during cross-examination, and

> "(1) the crime contained an element of dishonesty or false statement, or
>
> "(2) the crime contained an element of theft, and
>
> > "(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
> >
> > "(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect."

In other words, if the conviction contained an element of dishonesty or false statement, it is automatically admissible. *People v Allen*, 429 Mich 558, 605 (1988). If not, the court must determine whether the conviction contained an element of theft. *Allen, supra* at 605. If an element of theft is present and the crime was punishable by more than one year in prison, the court must decide whether the probative value of the evidence outweighs its prejudicial effect. *Id.* at 605-606. In determining the probative value of a prior conviction, the court must consider *only* the age of the conviction or the date on which the witness was released from confinement, whichever is later (i.e. whether the conviction or release occurred within the last ten years, MRE 609(c)) and "the degree to which a conviction of the crime is indicative of veracity." *Allen, supra* at 606; MRE 609(b). In determining the prejudicial effect of admitting the prior conviction, the court must consider *only* the conviction's "similarity to the charged offense and the importance of the defendant's testimony to the decisional process." *Allen, supra* at 606; MRE 609(b). As the similarity of charges and the importance of the defendant's testimony to the decisional process increases, so does the prejudicial effect. *Allen, supra* at 606.

The decision whether to allow impeachment by evidence of a prior conviction is within the trial court's sound discretion and will not be reversed absent abuse of that discretion. *People v Coleman*, 210 Mich App 1, 6 (1995). However, "[t]he erroneous admission of evidence of a prior conviction is harmless error where reasonable jurors would find the defendant guilty beyond a reasonable doubt even if evidence of the prior conviction had been suppressed." *Coleman, supra* at 7.

1. Notice of Intent to Impeach Defendant

The burden is not on the prosecutor in all cases to initiate a ruling regarding the use of a defendant's prior convictions before the defendant testifies. *People v Nelson*, 234 Mich App 454, 463 (1999). However, a request for a prior ruling is the prudent course, especially if admitting the prior conviction is discretionary. See MRE 609(b).

2. Use

Evidence of a defendant's prior criminal conviction can be introduced in a subsequent civil case based on the same conduct as long as it does not violate MRE 403. *Waknin v Chamberlain*, 467 Mich 329, 333-335 (2002). In *Waknin*, the probative value of the defendant's prior conviction was not substantially outweighed by its unfair prejudice. *Waknin, supra* at 335-336. The Michigan Supreme Court stated:

> "Where a civil case arises from the same incident that resulted in a criminal conviction, the admission of evidence of the criminal conviction during the civil case is prejudicial for precisely the same reason it is probative. That fact does not, without more, render admission of evidence of a criminal conviction unfair, i.e., substantially more prejudicial than probative." *Id.* at 336.

Where the transcript of an unavailable witness's preliminary examination testimony is properly admitted against the defendant at trial, the trial court must also permit the defendant to introduce evidence of the witness's prior criminal record for impeachment purposes. See *Vasquez v Jones*, 496 F3d 564, 574 n 6 (CA 6, 2007).

"[I]t is error to cross-examine a defendant about the duration and details of prior prison sentences to test his credibility." *People v Lindberg*, 162 Mich App 226, 234 (1987). The rationale for this rule is that only a defendant's prior conduct is relevant to his credibility, not the punishment for the conduct. *Lindberg, supra* at 234.

The defendant must testify to preserve for review the issue of improper impeachment by a prior conviction. *People v Finley*, 431 Mich 506, 526 (1988).

3. Jury Instructions

Civil. M Civ JI 5.03, Impeachment by Prior Conviction of Crime.

Criminal. CJI2d 3.4, Defendant—Impeachment by Prior Conviction.

F. Prior Consistent Statements

"Generally, a witness's prior consistent statement is inadmissible as substantive evidence. While such statements are hearsay, they are admissible in certain circumstances. A prior consistent statement is admissible to rehabilitate the witness following impeachment by a prior inconsistent statement or to rebut a charge of recent fabrication. A prior consistent statement is also admissible when there is a question as to whether the prior inconsistent statement was made." *Palmer v Hastings Mut Ins Co*, 119 Mich App 271, 273-274 (1982) (internal citations omitted).

"As a general rule, neither party in a criminal trial is permitted to bolster a witness'[s] testimony by seeking the admission of a prior consistent statement made by that witness." *People v Lewis*, 160 Mich App 20, 29 (1987). However, the statement is not considered hearsay and may be admissible where the statement is "consistent with the [witness's] testimony and is offered to rebut an express or implied charge against the [witness] of recent fabrication or improper influence or motive[.]" MRE 801(d)(1)(B).

Four elements must be established before admitting a prior consistent statement: "'(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.'" *People v Jones (Valmarcus)*, 240 Mich App 704, 707 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999). The motive mentioned in elements (2) and (4) must be the same motive. *Jones (Valmarcus), supra* at 712. Consistent statements made after the motive to fabricate arises constitute inadmissible hearsay. *People v McCray*, 245 Mich App 631, 642 (2001).

Prior consistent statements may be admitted through a third-party if the requirements of MRE 801(d)(1)(B) are met. See *Valmarcus Jones (Valmarcus)*, 240 Mich App at 706-707; *People v Mahone*, ___ Mich App ___, ___ (2011) (the victim's statement to her coworker, made

before the victim would have had a motive to falsify, was properly admitted through the coworker's testimony)..

"Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of the depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read." MCR 2.512(F).

G. Prior Inconsistent Statements

While examining a witness, a party is not required to show or disclose the contents of the witness's prior statement, unless requested by opposing counsel or the witness. MRE 613(a). "When a witness claims not to remember making a prior inconsistent statement, he [or she] may be impeached by extrinsic evidence of that statement. The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *People v Jenkins*, 450 Mich 249, 256 (1995). Where the substance of the prior inconsistent statement goes to a central issue in the case, admission of the statement is improper because it violates MRE 801 (hearsay rule). *People v Stanaway*, 446 Mich 643, 692-693 (1994). In seeking to admit extrinsic evidence of a prior inconsistent statement, the witness must be "afforded an opportunity to explain or deny the same and the opposite party [must be] afforded an opportunity to interrogate the witness thereon, or [as] the interests of justice otherwise require." MRE 613(b).

Extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Rosen*, 136 Mich App 745, 758 (1984). "[T]here are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he [or she] would not have been mistaken about if his [or her] story were true." *People v Guy*, 121 Mich App 592, 604-605 (1982), citing McCormick, Evidence (2d ed), § 47, p 98.

Generally, evidence of a prior inconsistent statement of the witness may be used to impeach a witness, even if it tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682 (1997). However, a prior inconsistent statement should not be admitted

when "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his [or her] credibility was relevant to the case." *Kilbourn*, 454 Mich at 683. The Court noted that this analysis is very narrow, and the facts in *Kilbourn* did not support a finding of inadmissibility based on this rule. *Id*.

"Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of the depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read." MCR 2.512(F).

1. Foundation

When seeking to admit a prior inconsistent statement, a proper foundation for the statement must be laid. *Barnett v Hidalgo*, 478 Mich 151, 165 (2007). To introduce impeachment testimony, the witness to be impeached must be asked whether he or she made the first statement, then asked whether he or she made the later, inconsistent statement. *Barnett, supra* at 165. Then, the proponent of the evidence must "allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness." *Id.*

2. Constitutional Considerations

Even where a defendant's prior inconsistent statement was elicited in violation of the Sixth Amendment, admission of the statement is generally permitted when it is offered as impeachment testimony. *Kansas v Ventris*, 556 US ___, ___ (2009). In *Ventris*, the defendant was charged with murder and aggravated robbery. *Ventris, supra* at ___. When the defendant took the stand, he testified that his codefendant committed the crimes. *Id.* at ___. The prosecution attempted to present testimony from an informant, planted in the defendant's jail cell by police officers, that the defendant admitted to robbing and shooting the victim. *Id.* at ___. The Kansas Supreme Court ultimately held that the informant's testimony was inadmissible for any reason, including impeachment. *Id.* at ___. The United States Supreme Court disagreed and concluded:

> "Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of 'the traditional truth-testing

> devices of the adversary process,' *Harris* [*v New York*, 401 US 222, 225 (1971)], is a high price to pay for vindication of the right to counsel at the prior stage.
>
> "On the other side of the scale, preventing impeachment use of statements taken in violation of *Massiah* [*v United States*, 377 US 201, 206 (1964)[13]] would add little appreciable deterrence. Officers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of *Massiah* would be of use for impeachment is exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment." *Ventris,* 556 US at ___.

3. Example

In medical malpractice cases, when an expert's trial testimony is not consistent with statements appearing in the expert's affidavit of merit, the affidavit of merit constitutes a prior inconsistent statement and is admissible at trial for impeachment purposes. *Barnett*, 478 Mich at 164-167.

4. Impeachment of Hearsay Declarants

MRE 806 allows, but does not require, evidence of a hearsay declarant's inconsistent statement or conduct to be admitted as impeachment evidence. *People v Blackston*, 481 Mich 451, 460-461 (2008). Evidence that may be admissible under MRE 806 "is still subject to the balancing test under MRE 403[.]" *Blackston, supra* at 461. In *Blackston*, the defendant argued that the trial court erred in refusing to admit at his second trial the statements made by two witnesses who recanted their testimony from the defendant's first trial. *Id.* at 457, 460. The Michigan Supreme Court found that the trial court's decision to exclude evidence of the witnesses' recantations "was principled and supported by Michigan law." *Id.* at 463. Because

[13] *Massiah v United States*, 377 US 201, 206 (1964), guarantees a defendant's Sixth Amendment right to counsel during interrogation by law enforcement officers or their agents.

the impeachment evidence was highly prejudicial to the prosecution and cumulative, and because a significant amount of untainted evidence existed against the defendant, the trial court did not err when it refused to admit the evidence. *Id.* at 473.

3.7 Refreshing Recollection

A. Rule of Completeness

MRE 106 is commonly referred to as the "rule of completeness." The rule states:

> "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

"MRE 106 does not automatically permit an adverse party to introduce into evidence the rest of a document once the other party mentions a portion of it. Rather, MRE 106 logically limits the supplemental evidence to evidence that 'ought in fairness to be considered contemporaneously with it.'" *People v Herndon*, 246 Mich App 371, 411 n 85 (2001).

Committee Tip:

The policy behind the rule is two-fold: (a) to avoid matters being taken out of context, resulting in false or misleading impressions; and (b) to provide the opposing attorney an opportunity to cure any prejudice created by a lack of context through later introduction of missing evidence.

B. Writing or Object Used to Refresh Memory

MRE 612 permits a witness to use a writing or an object to refresh his or her memory either while testifying or before testifying. MRE 612(a) and MRE 612(b). If a writing or object is used while testifying at a trial, hearing, or deposition, the adverse party is entitled to have it produced at the proceeding in which the witness is testifying. MRE 612(a) and MRE 612(c). If a writing or object is used before

testifying, the adverse party is entitled to have it produced, if practicable and if the court determines it is in the interest of justice, at the proceeding in which the witness is testifying. MRE 612(b).

MRE 612(c) provides guidance on the production and use of a writing or object:

> "A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence, for their bearing on credibility only unless otherwise admissible under these rules for another purpose, those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial."

C. Method of Refreshing Recollection of Witness

Before refreshing a witness's recollection with a writing, a proper foundation must be laid. The proponent "must show that (1) the witness's present memory is inadequate, (2) the writing could refresh the witness's present memory, and (3) reference to the writing actually does refresh the witness's present memory." *Genna v Jackson*, 286 Mich App 413, 423 (2009).

In *People v Favors,* 121 Mich App 98, 107-108 (1982), a criminal sexual conduct trial, the juvenile complainant recalled only part of her description of the defendant's apartment, even after reviewing her prior statement. The prosecutor further attempted to refresh her memory by reading the prior statement into evidence. *Favors, supra* at 108. The Court of Appeals held that this method of refreshing recollection was improper, stating:

> "Where the memory of a witness is to be refreshed, it is not necessary and is often highly prejudicial to permit the jury to hear the substance of the statement to be employed. Where memory or recollection is being refreshed, the material used for that purpose is not substantive evidence. Rather, the material is employed to simply trigger the witness's recollection of the events. That recollection is substantive evidence and the material used to refresh is not. The substance of the statement used to refresh is admissible only at the instance of the adverse party." *Favors, supra* at 109 (internal citations omitted).

D. Introducing a Past Recorded Recollection[14]

A writing may be used to refresh a witness's memory under MRE 612, but if the memory is not refreshed and the writing qualifies as a recorded recollection under MRE 803(5), it may be read into evidence or received as an exhibit if offered by an adverse party.

3.8 Depositions & Interrogatories

A. Use of Depositions at Trial

Ordinarily, depositions are considered hearsay. *Shields v Reddo*, 432 Mich 761, 766 (1989). However, there are exceptions such as MRE 803(18) (deposition testimony of an expert) and MRE 804(b)(5) (deposition testimony when the declarant is unavailable as a witness). Depositions are admissible subject to the rules of evidence. MCR 2.308(A).

The party seeking admission of a deposition bears the burden of proving admissibility under the rules of evidence, and admission is at the discretion of the court. *Lombardo v Lombardo*, 202 Mich App 151, 154 (1993). If it is used at trial, the deposition must be filed with the court or made an exhibit. MCR 2.302(H)(1)(b).

"Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of the depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before

[14] Recorded recollection is a hearsay exception with its own foundational requirements. See Section 4.3(B)(5).

they are read." MCR 2.513(F). See M Civ JI 4.11, which provides for instructions to the jury when a summary of a deposition is read.

B. Use of Interrogatories at Trial

"The answer to an interrogatory may be used [at trial] to the extent permitted by the rules of evidence." MCR 2.309(D)(3).

The decision whether to admit interrogatories at trial is reviewed for an abuse of discretion. *DaFoe v Mich Brass & Electric Co*, 175 Mich App 565, 568 (1989). "A trial judge does not abuse his [or her] discretion by refusing to admit interrogatories at trial which have already been answered by testimony, or which are irrelevant to the issues." *DaFoe, supra* at 568.

3.9 Self-Incrimination

A. Defendant as Witness

1. Defendant's Right to Testify

A defendant has a right to testify. *Rock v Arkansas*, 483 US 44, 49 (1987). There is no requirement that there be an on-the-record waiver of a defendant's right to testify. *People v Harris (Derrick)*, 190 Mich App 652, 661 (1991). The trial court has no duty to inquire into the defendant's waiver of the right to testify. *People v Bell*, 209 Mich App 273, 277 (1995).

2. Protection From Self-Incrimination

If the court determines that it is necessary to advise the witness of his or her Fifth Amendment rights, the advice should be given outside the presence of the jury. *People v Avant*, 235 Mich App 499, 512-517 (1999).

The right against self-incrimination protects a person from incriminating himself or herself for a crime already committed. *People v Bassage*, 274 Mich App 321, 325 (2007). Because a defendant commits a current crime when he or she decides to present false testimony (perjury), the Fifth Amendment does not apply to the perjured testimony. *Bassage, supra* at 326. The Court explained:

> "The bedrock for this principle is, we hope, unsurprising: providing false information is a course of action not authorized by the Fifth Amendment. *United States v Knox*, 396 US 77, 82

> (1969). Thus, although he was never informed of his right against self-incrimination, [the] defendant, by providing false testimony, took 'a course [of action] that the Fifth Amendment gave him no privilege to take.' *Id.* 'If the citizen answers the question, the answer must be truthful.' *United States v Wong*, 431 US 174, 180 (1977). Accordingly, we hold that the prosecutor had no obligation to advise [the] defendant of his Fifth Amendment right against self-incrimination, because that right was not implicated by [the] defendant's decision to commit perjury." *Bassage, supra* at 325-326.

B. Assertion of Privilege[15]

The Supreme Court discussed the trial court's role in determining whether a witness's assertion of the self-incrimination privilege should be permitted:

> "This privilege is held by the witness. However, the witness is not the sole judge of whether the testimony is or may be incriminating. The constitutional privilege against self-incrimination must not be asserted by a witness too soon, that is, where there is no reasonable basis for a witness to fear incrimination from questions which are merely preliminary. However, a trial court may compel a witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness." *People v Dyer*, 425 Mich 572, 578-579 (1986) (internal citations omitted).

When a testifying witness asserts his or her Fifth Amendment privilege, prejudice may result to the defendant because the jury may illogically infer guilt. *People v Poma*, 96 Mich App 726, 731 (1980), citing *People v McNary*, 43 Mich App 134, 140 (1972). For this reason, it is improper to call a witness knowing he or she will assert the Fifth Amendment privilege. *People v Paasche*, 207 Mich App 698, 708-709 (1994). The *Poma* Court explained how to avoid prejudice and protect the defendant's right to a fair trial:

> "When the court is confronted with a potential witness who is intimately connected with the criminal episode at issue, protective measures must be taken. The court should first hold a hearing outside the jury's presence to determine if the intimate witness has a legitimate

[15] See Section 1.10 on privileges.

> privilege. . . . This determination should be prefaced by an adequate explanation of the self-incrimination privilege so the witness can make a knowledgeable choice regarding assertion. . . . We do not believe that the burden of comprehending the privilege should rest with witnesses; the responsibility of informing must be the court's." *Poma*, 96 Mich App at 732 (internal citations omitted).

Generally, a witness cannot make a blanket assertion of his or her Fifth Amendment right against self-incrimination before being questioned. *United States v Highgate*, 521 F3d 590, 594 (CA 6, 2008). Furthermore, where a witness does make a blanket assertion of the right, a trial court must determine whether the witness's silence is justified; that is, the court must determine whether "the claimed privilege is grounded on a reasonable fear of prosecution." *Highgate, supra* at 593. In *Highgate*, the trial court erred when it failed to inquire into the scope and legitimacy of the witness's claimed privilege, but the error was harmless. *Id.* at 594. In reviewing the trial court's decision, the Sixth Circuit recognized that an inquiry is futile when it is clear that the witness intends to assert the privilege in response to any question asked. *Id.* Because the witness's testimony "would not have altered the jury's verdict in light of the overwhelming evidence of guilt[,]" the trial court's decision was affirmed. *Id.* at 595.

"[A] defendant in a civil action may assert the privilege against self-incrimination in his [or her] answer to the complaint when he [or she] believes that responding to particular paragraphs or allegations in the complaint call for an incriminating response." *Huntington Nat'l Bank v Ristich*, ___ Mich App ___, ___ (2011). However, "[a] defendant must answer the allegations in the complaint that he [or she] can and make a specific claim of privilege to the rest. A defendant's proper invocation of the privilege in an answer will be treated as a specific denial." *Huntington Nat'l Bank, supra* at ___.

C. Application of the Privilege

A person's Fifth Amendment privilege against self-incrimination applies to both criminal and civil proceedings. *Phillips v Deihm*, 213 Mich App 389, 399-400 (1995). "The privilege against self-incrimination not only permits a person to refuse to testify against himself [or herself] at a criminal trial in which he [or she] is a defendant, but also permits him [or her] not to answer official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings." *Phillips, supra* at 399-400.

1. Civil Proceedings

"[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." *Phillips*, 213 Mich App at 400.

a. Individuals

By invoking the Fifth Amendment, a person cannot be forced to answer any question that would "furnish a link in the chain of evidence needed to prosecute." *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 677 (2011) (internal quotations omitted). "'To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" *PCS4LESS, LLC, supra* at 672-673, quoting *Malloy v Hogan*, 378 US 1, 11-12 (1964). "A court should bar a claim of privilege under the Fifth Amendment only when the answer cannot possibly be incriminating." *PCS4LESS, LLC, supra* at 673 (trial court's order that defendants either produce a software program or submit affidavits denying possession of the program violated the Fifth Amendment privilege against compelled self-incrimination because compliance with the order might have "furnish[ed] a link in the chain of evidence needed to prosecute").

b. Organizations

Organizations are not generally protected by the Fifth Amendment privilege against self-incrimination. *PCS4LESS, LLC*, 291 Mich App at 679. In addition, "the custodian of an organization's records may not refuse to produce the records even if those records might incriminate the custodian personally[,]" if the custodian holds the records in a representative capacity. *PCS4LESS, LLC, supra* at 679-680. If the custodian holds the records in a personal capacity, the Fifth Amendment privilege applies. *Id.* at 681. In *PCS4LESS, LLC, supra* at 681, citing *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 720 (1984), the Court of Appeals identified a three part test a court may use to determine whether the privilege against

self-incrimination may be used to prevent the production of an organization's documents:

> "1. Are the documents the records of the organization rather than those of the individual who has possession of them?
>
> "2. Does the custodian hold the records in a representative, rather than a personal, capacity?
>
> "Assuming affirmative answers, in the case of a corporation the inquiry is ended because of the special nature of the corporate form and the state's reservation of visitatorial powers over corporations. In the case of non-corporate organizations, however, a third question arises:
>
> "3. Does the organization have an established institutional identity which is recognized as an entity apart from its individual members?" (trial court's order for a corporation to either produce a software program or submit an affidavit denying possession of the program did not violate the Fifth Amendment privilege against compelled self-incrimination because the privilege does not apply to organizations).

2. Criminal Proceedings

The privilege against self-incrimination is available at sentencing; it is not waived by a defendant's guilty plea. *Mitchell v United States*, 526 US 314, 325 (1999).

D. Evidence of Silence

Generally, a defendant's silence after arrest and having received *Miranda*[16] warnings is inadmissible at trial. *People v Boyd*, 470 Mich 363, 374-375 (2004).[17] However, an arrested defendant's silence after *Miranda* may be used against the defendant if he or she "testifies to an exculpatory version of events and claims to have told the police

[16] *Miranda v Arizona*, 384 US 436 (1966).

[17] See the Michigan Judicial Institute's *Michigan Circuit Court Benchbook: Criminal Proceedings,* Chapter 3, on asserting *Miranda* rights.

the same version upon arrest." *Doyle v Ohio*, 426 US 610, 619 n 11 (1976). See also *Boyd, supra* at 374-375.

3.10 Lay Testimony

A. Admissibility

MRE 701 limits lay opinion testimony to certain circumstances. According to MRE 701:

> "If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue."

B. Distinction Between Lay and Expert Testimony

The Michigan Court of Appeals noted the difference between testimony by a lay witness and an expert witness in *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455 (1995) (internal citations omitted):

> "Lay witness testimony in the form of an opinion is permitted where it is rationally based on the witness'[s] perception and helpful to a clear understanding of the witness'[s] testimony or the determination of a fact at issue. An expert witness is one who has been qualified by knowledge, skill, experience, training, or education and is used where scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or determine a fact at issue."

C. Physical Observation

"Any witness is qualified to testify as to his or her physical observations and opinions formed as a result of them." *Lamson v Martin (After Remand)*, 216 Mich App 452, 459 (1996).

D. Property

A lay witness may testify as to his or her opinion of the monetary value of his or her real property, *Grand Rapids v H R Terryberry Co*, 122 Mich App 750, 753-754 (1983), or personal property, *People v*

Watts, 133 Mich App 80, 83-84 (1984). Also see MRE 1101(b)(8) regarding the admissibility of hearsay concerning proof of property value at a preliminary examination.

For purposes of MRE 1101(b)(8), "ownership" of property includes the right to sell that property. *People v Caban*, 275 Mich App 419, 422 (2007). In *Caban*, an out-of-court statement made by a nonexpert regarding a defendant's right to convey a piece of property was admissible at a defendant's preliminary examination for a crime related to the defendant's authority to sell the property. *Caban, supra* at 422. MRE 1101(b)(8) also authorizes hearsay to be admitted at a preliminary examination when the hearsay involves proof of ownership, use authority, possession, and entry of property.

3.11 Expert Testimony[18]

A. Admissibility

1. Rule

MRE 702 explains the conditions under which expert testimony may be admitted at trial:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

2. Practice

Effective January 1, 2004, Michigan adopted the *Daubert*[19] test by amending MRE 702. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782 (2004), which states:

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[18] Also see the following sections: Section 3.12, Syndrome Evidence—Expert Testimony; Section 3.13, Medical Malpractice—Expert Testimony; and Section 3.14, Police Officer as Witness.

[19] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 595 (1993), requires the court to focus its inquiry "solely on principles and methodology, not the conclusions that they generate."

> "MRE 702 has [] been amended explicitly to incorporate *Daubert's* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on 'novel' science—is reliable.
>
> * * *
>
> "[T]he court's gatekeeper role is the same under *Davis-Frye*[20] and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just 'general acceptance' in determining whether expert testimony must be excluded."

See also MCL 600.2955, which codifies the *Daubert* test in certain tort actions. MCL 600.2955(1) only requires the court to *consider* the seven factors enumerated there; it does not require each factor to favor the proffered testimony in order to be admissible. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 137 (2007).

An expert witness's failure to identify any medical or scientific literature in support of his or her testimony does not necessarily suggest that the expert's opinion is unreliable or inadmissible. *People v Unger*, 278 Mich App 210, 220 (2008). In *Unger*, the Michigan Court of Appeals noted, "[I]t is obvious that not every particular factual circumstance can be the subject of peer-reviewed writing. There are necessarily novel cases that raise unique facts and have not been previously discussed in the body of medical texts and journals."*Unger, supra* at 220. However, "a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony." *Edry v Adelman*, 486 Mich 634, 640 (2010). In *Edry*, the plaintiff's expert witness's opinion was not based on reliable principles or methods, was contradicted by both the defendant's expert witness and published literature that was admitted and acknowledged as authoritative by the plaintiff's

[20] The *Davis-Frye* test was derived from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).

expert, and the plaintiff failed to admit any literature that supported her expert's testimony. *Edry, supra* at 640. The Michigan Supreme Court concluded that "in this case the lack of supporting literature, combined with the lack of any other form of support for [the expert's] opinion, renders his opinion unreliable and inadmissible under MRE 702." *Edry, supra* at 641.

In *People v Dobek*, 274 Mich App 58, 92 (2007), the defendant was not allowed to use an expert witness who, through psychological testing and interviewing, planned to testify that the defendant did not demonstrate the typical characteristics of a sex offender. The expert witness admitted that psychological testing cannot "tell you with any degree of certainty that a person is or is not a sex offender." *Dobek, supra* at 95. The Court of Appeals compared the danger of admitting evidence of sex offender profiling to that of admitting the results of a polygraph test. *Id.* at 97. According to the Court, the expert's testimony "was neither sufficiently scientifically reliable nor supported by sufficient scientific data[,]" as required by MRE 702. *Dobek, supra* at 94-95. In addition, "the proffered evidence would not assist the trier of fact to understand the evidence or determine a fact in issue; rather, any arguable probative value attached to the evidence would be substantially outweighed by the danger of unfair prejudice to the prosecution, confusion of the issues, or misleading the jury." *Id.* at 95.

Referring to *Dobek*, 274 Mich App 58, as "on point and indistinguishable," the Court of Appeals affirmed the trial court's exclusion of expert testimony regarding sex offender profiling and its application to the defendant. *People v Steele*, 283 Mich App 472, 482 (2009) (the same expert witness as in *Dobek, supra*, was to testify that the defendant did not demonstrate the typical characteristics of a sex offender).

B. Scheduling Testimony

"In a civil action, the court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

> "(1) Scheduling the presentation of the parties' expert witnesses sequentially; or
>
> "(2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination." MCR 2.512(G).

C. Number of Experts

No more than three experts on the same issue are allowed to testify on either side unless the court, in exercising its discretion, permits more. MCL 600.2164(2).

D. Fees

MCL 600.2164(1) states in relevant part:

> "No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case."

"MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466 (2001) (the trial court did not abuse its discretion in ordering a lower amount for expert witness fees than requested by the plaintiff because it "considered and weighed the reasonableness of [the] plaintiff's request[]"). See also *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 342 (1994), where the trial court abused its discretion when it completely refused to award expert witness fees to the defendant after determining that the witness was in fact an expert.

Contingency fees are prohibited for expert witnesses in medical malpractice cases. MCL 600.2169(4).

Even where an expert witness does not testify, the prevailing party may still recover expert witness fees for the cost of preparing the witness. *Peterson v Fertel*, 283 Mich App 232, 241 (2009).

E. Discovery

1. Civil Cases

Experts who are expected to testify at trial must be identified and "facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for trial" are subject to discovery only as provided in MCR 2.302(B)(4)(a)(*i*)–MCR 2.302(B)(4)(a)(*iii*). "A party may not discover the identify of and facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation

of litigation or preparation for trial and who is not expected to be called as a witness at trial, except

> "(*i*) as provided in MCR 2.311 [(physical and mental examination of an individual)], or
>
> "(*ii*) where an order has been entered on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by another means." MCR 2.302(B)(4)(b)(*i*)–MCR 2.302(B)(4)(b)(*ii*).

Discovery is not permitted of any expert witness's written communications to a party's attorney unless there is a showing of substantial need or undue hardship. MCR 2.302(B)(3)(a).

Unless manifest injustice would result, the court shall require that the party seeking discovery of an expert pay the expert a reasonable fee for time spent in a deposition. MCR 2.302(B)(4)(c)(*i*). This does not include preparation time. *Id*. The party seeking discovery may have to pay "a fair portion of the fees and expenses reasonably incurred by the [other] party in obtaining facts and opinions from the expert." See MCR 2.302(B)(4)(c)(*ii*).

2. Criminal Cases

Upon request, a party must provide all other parties with "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion." MCR 6.201(A)(3). However, failure to do so does not necessarily require the court to preclude the expert from testifying. See *People v Rose*, 289 Mich App 499 (2010). In *Rose*, the trial court permitted an expert to testify even though the prosecutor failed to comply with the court's discovery order to supply the opposing party with the expert's curriculum vitae or summary of his proposed testimony. The Court of Appeals affirmed the trial court's decision because the expert's testimony was limited in nature (the expert did not comment on the substantive facts in the case), the defendant waited until the day before trial to raise the issue (notice of the expert was given months before trial), and no evidence of prejudice to the defendant existed. *Rose, supra* at 526.

F. Factual Basis for Opinion

MRE 703 states:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.[21] This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

MRE 703 "permits 'an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony.'" *People v Fackelman*, 489 Mich 515, 534 (2011), quoting 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703). In *Fackelman*, the testifying experts relied on a report generated by a non-testifying expert who had observed and diagnosed the defendant shortly after the incident giving rise to the case. *Fackelman, supra* at 518, 521-522. The report contained facts and data, in addition to opinion evidence (the defendant's diagnosis), which was deemed inadmissible under the federal and state constitutions, as well as MRE 703. *Id.* at 536. The Michigan Supreme Court concluded that "because the diagnosis was inadmissible . . . the report should have been redacted before it was admitted into evidence, and the jury should have been instructed that the proper and limited purpose of the report was to allow them to consider the facts and data on which the testifying experts based their opinions." *Id*.

"In the particular case" is a phrase in MRE 703 that limits the type of evidence that must be admitted as the basis for an expert's opinion "to facts or data that are *particular* to that case." *People v Yost*, 278 Mich App 341, 390 (2008). In *Yost*, the defendant was accused of killing her daughter by administering a lethal dose of Imipramine, a medication used to control bedwetting and anxiety. *Yost, supra* at 344-345. The trial court precluded the defendant's expert witness from testifying about the pharmacological characteristics of Imipramine (its half-life, post mortem redistribution, the volume of distribution, and the level of Imipramine that would be considered lethal) because the testimony was based on an outside source and constituted inadmissible hearsay. *Id.* at 388-389. The Court of Appeals reversed this decision and explained that some of the facts or data particular to the *Yost* case included the child's weight, the dosage of Imipramine prescribed, and the actual level of

[21] This is a significant change from the prior rule, which gave the court discretion to allow an expert opinion to be based on facts *not* in evidence.

Imipramine in the child's blood, but that the pharmacological characteristics of Imipramine were "constants in every case involving Imipramine." *Id.* at 390. Because the pharmacological characteristics of Imipramine were not particular to the *Yost* case, "it was not necessary to have those data in evidence before [the expert] could utilize them in rendering an opinion." *Id.* at 390.

G. Cross-Examination

On cross-examination, it is proper to elicit the number of times an expert witness has testified in court, or has been involved in particular types of cases. *Wilson v Stilwill*, 411 Mich 587, 599-600 (1981). "A pattern of testifying as an expert witness for a particular category of plaintiffs or defendants may suggest bias. However, such testimony is only minimally probative of bias and should be carefully scrutinized by the trial court." *Wilson, supra* at 601.

Repeated references to expert witnesses as "hired guns" may require a new trial. See *Wilson*, 411 Mich at 605 (statement implying an expert witness was a "professional witness" did not require new trial); *Kern v St. Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354 (1978) (when defense counsel "continuously raised the groundless charge, by direct attack and innuendo, that the 'bought' testimony of plaintiffs' out-of-state expert witnesses was collusive and untrue," it was so prejudicial that it required a new trial); *Wolak v Walczak*, 125 Mich App 271, 275 (1983) (court's allowance of a single statement characterizing expert witness as a "professional witness" who resides out of state, did not require new trial).

H. Opinion on Ultimate Issue

"[T]he function of an expert witness is to supply expert testimony. This testimony includes opinion evidence, when a proper foundation is laid, and opinion evidence may embrace ultimate issues of fact. However, the opinion of an expert may not extend to the creation of new legal definitions and standards, and to legal conclusions." *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 122 (1996). Further, an expert witness is not permitted to tell the jury how to decide the case. *People v Drossart*, 99 Mich App 66, 79 (1980). "[A] witness is prohibited from opining on the issue of a party's negligence or nonnegligence, capacity or noncapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or [the accused's] guilt or innocence." *Drossard, supra* at 79-80. Therefore, it is error to permit a witness to give the witness's own opinion or interpretation of the facts because doing so would "invade[] the province of the jury." *Id.* at 80. "An expert witness also may not give testimony regarding a question of

law, because it is the exclusive responsibility of the trial court to find and interpret the law." *Carson Fischer Potts and Hyman, supra* at 123.

I. Report

The court rules and rules of evidence do not directly address the introduction of the expert's report as evidence. Arguably, it is hearsay or cumulative, but see MRE 1006[22] regarding a summary as an exhibit.

Upon request, a party must provide "either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion[.]" MCR 6.201(A)(3) (applicable only to felony cases). This is similar to the rule in civil cases, MCR 2.302(B)(4)(a)(*i*) (use of interrogatories to gather information on expert testimony, facts and opinions, and summary of grounds for opinions).

J. Court Appointed Expert

The court is authorized to appoint expert witnesses in any case. MRE 706. See also MCL 775.15 (authorizing the court to appoint an expert witness in a criminal case for an indigent defendant). The court may seek nominations by the parties and appoint an agreed-upon expert, or appoint an expert of the court's own selection. MRE 706(a). The court cannot appoint an expert unless the expert consents to the appointment. *Id.* An appointed expert must be informed of his or her duties, either in writing or at a conference where all parties are able to participate. *Id.* The appointed witness must disclose any findings to all parties. *Id.* In addition, the witness may be required to participate in a deposition or to testify at trial. *Id.* If testifying, the witness will be subject to cross-examination by any party, even the party calling the witness. *Id.*

It is improper for the court to "delegate its functions of making conclusions of law, reviewing motions, requiring the production of evidence, issuing subpoenas, conducting and regulating miscellaneous proceedings, examining documents and witnesses, and preparing final findings of fact" to an appointed expert witness. *Carson Fischer Potts and Hyman*, 220 Mich App at 121. In *Carson Fischer Potts*, the trial court appointed an expert to "'make findings of fact, conclusions of law and a final recommendation and proposed judgment'" for the court. *Id.* at 118. The Michigan Court of Appeals concluded it was error to "delegate specific judicial functions to an 'expert witness.' It is within the peculiar province of

[22] See Section 5.4(C)(4).

the judiciary to adjudicate upon and protect the rights and interests of the citizens, and to construe and apply the laws." *Id.* at 121.

"To obtain the appointment of an expert witness, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert." *People v Carnicom*, 272 Mich App 614, 617 (2006). Moreover, it is not enough that the defendant shows a mere possibility of assistance from the requested expert. *Carnicom, supra* at 617. Without some showing by the defendant that the "expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness." *Id*. In *Carnicom*, the defendant requested that the court authorize funds to conduct an independent test of the defendant's blood sample. *Id.* at 616. The defendant asserted that this witness would be able to offer testimony to explain away the presence of an illegal substance in the defendant's bloodstream at the time of his arrest. *Id.* at 618. However, the defendant made no showing that the expert testimony would likely benefit him. *Id.* In light of the defendant's failure to demonstrate that the requested expert's testimony would likely benefit him, the Court found that the trial court had not abused its discretion when it denied defendant's request for funds. *Id.* at 619.

K. Motion to Strike

A defendant may move to strike a plaintiff's expert if the defendant believes that the "expert is not qualified because he [or she] does not specialize in what the defendant believes to be the relevant specialty[.]" *Woodard v Custer*, 476 Mich 545, 574 (2006). "A party must move to strike an expert within a reasonable time after learning the expert's identity and basic qualifications. The failure to timely do so results in forfeiture of the issue." *Cox v Flint Bd of Hosp Mgrs (On Remand)*, 243 Mich App 72, 80 (2000), rev'd on other grounds 467 Mich 1 (2002).

L. Jury Instructions

Civil. No instruction recommended. See M Civ JI 4.10.

Criminal. CJI2d 5.10 – Expert Witness.

3.12 Syndrome Evidence—Expert Testimony

A. Battered Woman Syndrome

Expert testimony on the "generalities or characteristics" associated with battered woman syndrome is admissible for the narrow

purpose of describing the victim's distinctive pattern of behavior that was brought out at trial. *People v Daoust*, 228 Mich App 1, 10 (1998), overruled in part on other grounds *People v Miller*, 482 Mich 540 (2008).

Expert testimony relating to the characteristics associated with battered woman syndrome is admissible when the witness is properly qualified and the testimony is relevant and helpful to the jury's evaluation of the complainant's credibility. *People v Christel*, 449 Mich 578, 579-580 (1995). The expert's testimony is admissible to help explain the complainant's behavior, but the testimony is not admissible to express the expert's opinion of whether the complainant was a battered woman or to comment on the complainant's honesty. *Christel, supra* at 580.

B. Sexually Abused Child Syndrome

In child sexual abuse cases, an expert witness's testimony is limited. *People v Peterson*, 450 Mich 349, 352 (1995), modified 450 Mich 1212 (1995). The expert witness may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of the victim, or (3) testify to the defendant's guilt. *Peterson, supra* at 352.

Despite these limitations, "(1) an expert may testify in the prosecutor's case-in-chief [(rather than only in rebuttal)] regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson*, 450 Mich at 352-353.

A defendant must raise certain issues before expert testimony is admissible to show that the victim's behavior was consistent with sexually abused victims generally:

> "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse." *Peterson*, 450 Mich at 373-374.

Where the defense theory raised the issue of the complainant's postincident behavior (attempting suicide), it was not an abuse of discretion to admit expert testimony comparing the child-victim's

postincident behavior with that of sexually abused children. *People v Lukity*, 460 Mich 484, 500-502 (1999). The Court stated:

> "Under *Peterson*, [450 Mich 349 (1995),] raising the issue of a complainant's post[]incident behavior opens the door to expert testimony that the complainant's behavior was consistent with that of a sexual abuse victim. Accordingly, the trial court did not abuse its discretion in allowing [the expert] to testify.
>
> "Moreover, [the] defendant effectively cross-examined [the expert] and convincingly argued in closing that the fact that a behavior is 'consistent' with the behavior of a sexual abuse victim is not dispositive evidence that sexual abuse occurred. Specifically, [the defendant] argued that 'almost any behavior is not inconsistent with being a victim of sexual assault.'" *Lukity, supra* at 501-502.

In *People v Smith (Jeffrey)*, the case consolidated with *Peterson*, the Michigan Supreme Court found that the trial itself was "an almost perfect model for the limitations that must be set in allowing expert testimony into evidence in child sexual abuse cases." *Peterson*, 450 Mich at 381. In that case, the victim delayed reporting the abuse for several years, but the defendant did not ask the victim any questions suggesting that the delay in reporting was inconsistent with the alleged abuse nor did the defendant attack the victim's credibility. *Id.* at 358. The trial court allowed a single expert to clarify, during the prosecutor's case-in-chief, that child sexual abuse victims frequently delay reporting the abuse. *Id.* at 359-360. The expert's testimony helped to dispel common misperceptions held by jurors regarding the reporting of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility. *Id.* at 379-380.

Expert testimony may also be admissible regarding patterns of behavior exhibited by adult sex offenders to desensitize child victims. *People v Ackerman*, 257 Mich App 434, 442 (2003). In *Ackerman*, before committing acts of sexual misconduct, the defendant repeatedly allowed his pants to fall down, exposing his genitals, to several girls at a youth community center. *Ackerman, supra* at 441. The Court stated that this behavior "supported an inference that [the] defendant's actions were part of a system of desensitizing girls to sexual misconduct." *Id.* In addition, the Court affirmed the trial court's decision to allow an expert to testify as to the common practices of child molesters, which often includes desensitizing the victim. *Id.* at 443-444. The Court stated:

> "We believe that most of our citizen-jurors lack direct knowledge of or experience with the typical forms of conduct engaged in by adults who sexually abuse children. Accordingly, the trial court reasonably concluded that testimony about the typical patterns of behavior exhibited by child sexual abuse offenders would aid the jury." *Id.* at 445.

3.13 Medical Malpractice—Expert Testimony[23]

A. Requirements

MRE 702 requires an expert witness to be qualified in order to testify. MCL 600.2169(1) and (2) set forth the qualifications necessary for an expert witness to testify regarding the standard of care in medical malpractice cases. MCL 600.2169 "does not impermissibly infringe on [the Supreme Court's] constitutional rule-making authority over 'practice and procedure.'" *McDougall v Schanz*, 461 Mich 15, 37 (1999).

"The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169." *Clerc v Chippewa Co War Memorial Hosp (Clerc II)*, 477 Mich 1067, 1067 (2007). "A party must move to strike an expert within a reasonable time after learning the expert's identity and basic qualifications. The failure to timely do so results in forfeiture of the issue." *Cox v Flint Bd of Hosp Mgrs (On Remand)*, 243 Mich App 72, 80 (2000), rev'd on other grounds 467 Mich 1 (2002).

B. Standard of Care

1. Generally

In malpractice cases, expert testimony is required to establish the applicable standard of care and to demonstrate any violation of that standard. *Gonzalez v St John Hosp & Med Ctr*, 275 Mich App 290, 294 (2007). General practitioners are held to a local or similar community standard of care; specialists are held to a nationwide standard of care. *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 383 (1994). Nurses are not engaged in the practice of medicine and are, therefore, not held to the same standard of care as general practitioners or

[23] This section includes information on expert testimony that is specific to medical malpractice cases. See Section 3.11 for general information on expert testimony.

specialists. *Decker v Stoiko*, 287 Mich App 666, 686 (2010). "Rather, the common law standard of care applies to malpractice actions against nurses. '[T]he applicable standard of care is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities.' The standard of care required of a nurse must be established by expert testimony." *Decker, supra* at 686 (internal citations omitted). In *Decker*, the defendant appealed because the "plaintiff's expert reviewed the case 'in light of a "national" standard of care[,]'" as opposed to a local one. *Id*. at 685. The Court of Appeals concluded that, although the expert stated she was applying a national standard of care to her testimony, "the actual substance of [the expert's] lengthy testimony was that the procedures at issue [in *Decker* were] so commonplace that the *same* standard of care applied locally and nationally. . . . Thus, [the] plaintiff's expert applied the proper standard of care, which happened to be the same locally as well as nationally." *Id.* at 686-687.

"[MCL 600.2169(1)(b)] states that the [proposed] expert must have spent the *majority* of his or her time the year preceding the alleged malpractice practicing or teaching the specialty the defendant physician was practicing at the time of the alleged malpractice." *Kiefer v Markley*, 283 Mich App 555, 559 (2009). The Michigan Court of Appeals interpreted this to mean that the proposed expert physician must "spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice." *Kiefer, supra* at 559.

A board certified family practitioner who had been engaged in the general practice of medicine as a family practitioner during the year prior to the date of the alleged malpractice was qualified under MCL 600.2169(1)(c) to testify against a defendant doctor who was a general practitioner. *Robins v Garg* (*On Remand*), 276 Mich App 351, 360-361 (2007). The *Robins* Court noted that a different outcome would result if the defendant was a board certified family practitioner and the plaintiff's expert witness was a general practitioner. *Robins*, *supra* at 360 n 3. In such a case, the plaintiff's witness would not be qualified to testify against the defendant doctor because *Woodard v Custer*, 476 Mich 545, 560-561 (2006), and MCL 600.2169(1)(a) require the plaintiff's expert witness to be board certified in the same specialty as the defendant doctor if the alleged malpractice occurred during the defendant's practice in that specialty. *Robins*, *supra* at 360 n 3. See also *Woodard, supra* at 560-561.

Obstetricians/gynecologists are not qualified to testify regarding the standard of care applicable to nurse midwives because they do not practice in "the same health profession" as a nurse midwife. *McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 496-497 (2006). The Court stated:

> "Though it may appear reasonable that a physician with substantial educational and professional credentials should be able to testify about the standard of care of a nurse who works in a closely related field, we are constrained by the plain words of the statute [(MCL 600.2169(1)(b)] that the expert witness must practice in the 'same health profession.' Consequently, we conclude that because nurse midwives are separately licensed professionals who practice nursing with specialty certification in the practice of nurse midwifery, obstetricians/gynecologists may not testify about their standard of practice or care." *McElhaney, supra* at 497.

Where a party seeks to admit expert testimony regarding the appropriate standard of care for a physician assistant, MCL 600.2169(1)(b) applies because MCL 600.2169(1)(a) and (1)(c) apply only to physicians, and MCL 600.2169(1)(b) applies both to physicians and other health professionals, which includes physician assistants. *Wolford v Duncan*, 279 Mich App 631, 635-637 (2008).

2. Specialists

"[A] 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified." *Woodard*, 476 Mich at 561. MCL 600.2169(1) requires a proposed expert to meet certain criteria when a defendant is a specialist. The statute states, in relevant part:

> "(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> > "(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf

> the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> "(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> > "(*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
> >
> > "(*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty."

Although a trial court errs by waiting to establish the applicable standard of care until after the proofs have closed, such an error does not always require reversal. *Jilek v Stockson*, ___ Mich ___, ___ (2011). In *Jilek*, the trial court allowed the parties to argue at trial which standard of care applied, ultimately deciding the issue in the defendants' favor after the close of proofs. *Jilek, supra* at ___. However, because the trial court had been misled by the plaintiff's own arguments, and it did not preclude the plaintiff from presenting standard-of-care testimony for both specialties, upholding the jury's verdict in favor of the defendants was not "'inconsistent with substantial justice' under MCR 2.613(A)." *Jilek, supra* at ___.~~"The applicable specialty must be determined before trial so that objections to expert witnesses can be made and the parties can appropriately argue their proofs under a single standard of care." *Jilek v Stockson*, 289 Mich App 291, 305 (2010). In *Jilek*, the trial court led the parties to believe that it had decided the~~

standard of care was that of emergency medicine when it approved the affidavit of merit. *Jilek, supra* at 304. The trial court later confirmed this decision when it ruled that an emergency room expert could testify as to the standard of care. *Id.* However, the court allowed the parties to argue during trial what relevant specialty and standard of care applied to the case. *Id.* at 304-305. At the end of trial, "[t]he court then instructed the jury that the applicable standard of care was that of 'a physician specializing in family practice and working in an urgent care center.'" *Id.* at 300-301. The Court of Appeals concluded that the trial court's failure to clearly establish and consistently apply the applicable specialty and standard of care required reversal. *Id.* at 305. The Court stated:

> "It is highly confusing to juries, and prejudicial to the parties, to permit argument throughout trial about what specialty was being practiced. Waiting until the end of trial to determine the applicable standard of care results in the jury hearing standard of care evidence from experts who are not qualified to so testify. The trial court erred as a matter of law by either changing its pre-trial ruling that the emergency medicine standard applied or alternatively, by withholding a final decision on the relevant standard until the close of proofs and permitting experts advocating dueling standards of care to testify to the jury." *Jilek*, 289 Mich App at 305.

A plaintiff's expert witness's credentials need not match the defendant's expert witness's credentials in every respect. *Woodard*, 476 Mich at 559-560. According to the *Woodard* Court:

> "[T]he plaintiff's expert [is only required] to match one of the defendant physician's specialties. Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." *Woodard, supra* at 560.

Where a defendant doctor was practicing outside of her board certification and the defendant doctor could have obtained a

board certification in that particular area, the defendant doctor was practicing as a "specialist" when the alleged malpractice occurred. *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622, 630 (2007). This means that the plaintiff's expert must be a specialist, as well. *Reeves, supra* at 630.

The level of certification required of a plaintiff's expert witness in the relevant area of medicine depends on the level of certification achieved by the defendant. See *Reeves*, 274 Mich App at 629. For example, if a defendant is board certified in the specialty he or she was practicing at the time of the alleged malpractice, the expert witness must also be board certified in the same specialty. If a defendant is merely a specialist who is *not* board certified, at a minimum, the expert witness must be a specialist. *Id.* at 629. Even where an expert witness is board certified, as is the case in *Reeves*, the witness must also satisfy the requirements of a specialist as defined in MCL 600.2169(1)(b). *Reeves, supra* at 629-630. In *Reeves*, the record did not reflect any information pertaining to the expert's status as a specialist under MCL 600.2169(1)(b), so the Court of Appeals remanded the case to the trial court to determine the issue. *Reeves, supra* at 630.

A board certified family practitioner who had been engaged in the general practice of medicine as a family practitioner during the year prior to the date of the alleged malpractice was qualified under MCL 600.2169(1)(c) to testify against a defendant doctor who was a general practitioner. *Robins*, 276 Mich App at 360-361. The *Robins* Court noted that a different outcome would result if the defendant was a board certified family practitioner and the plaintiff's expert witness was a general practitioner. *Id.* at 360 n 3. In such a case, the plaintiff's witness would not be qualified to testify against the defendant doctor because *Woodard* and MCL 600.2169(1)(a) require that when a defendant doctor is board certified in a specialty, the plaintiff's expert witness must be board certified in the same specialty if the alleged malpractice occurred during the defendant's practice in that specialty. *Woodard*, 476 Mich at 560-561; *Robins*, *supra* at 360 n 3.

"[F]or purposes of a matching specialty analysis as required by MCL 600.2169(1)(a) . . . there is no difference between a defendant physician who is board certified in a specialty but is practicing outside of that specialty at the time of the alleged malpractice and a physician, like [a third-year surgical resident], 'who can potentially become board certified' and is practicing in a specialty but is not board-certified in that specialty." *Gonzalez*, 275 Mich App at 303. In *Gonzalez*, because the defendant was practicing as a third-year surgical resident

when the alleged malpractice occurred and the plaintiff's expert was a board-certified general surgeon who provided the plaintiff with an affidavit of merit, summary disposition was improper without further examination of the expert's qualifications and a determination of the defendant's status as a specialist. *Id*. at 307.

C. Exceptions to Requirement of Expert Testimony

There are two exceptions to the requirement that an expert testify in a medical malpractice action:

- where the alleged negligence is a "matter of common knowledge and observation";
- where the elements of res ipsa loquitur are satisfied, negligence may be inferred. *Thomas v McPherson Comm Health Ctr*, 155 Mich App 700, 705 (1986).

D. Hospitals

"[V]iolation of a regulation promulgated pursuant to statutory authority is admissible in a medical malpractice action," but hospital policies do *not* establish the standard of care or its violation. *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761, 764-768 (1988). ~~However, "they should be admitted so long as they are relevant to the applicable specialty's standard of care and to the injury alleged." *Jilek v Stockson*, 289 Mich App 291, 314 (2010).~~

A hospital incident report or peer review record may be inadmissible under MCL 333.20175(5), (8), and MCL 333.21515. See also *Gallagher*, 171 Mich App at 769-770.

E. Discovery

A defendant's attorneys are entitled to communicate ex parte with a plaintiff's treating physician when the plaintiff has waived the physician-patient privilege.[24] *Domako v Rowe*, 438 Mich 347, 362 (1991). See also MCR 2.302(C). Pursuant to MCR 2.314(A)(1), when the mental or physical condition of a party is in controversy, medical information is generally subject to discovery. *Davis v Dow Corning*

[24] This informal approach to discovery is not contrary to the Health Insurance Portability and Accountability Act (HIPAA). *Holman v Rasak*, 486 Mich 429, 446 (2010). The Michigan Supreme Court stated that "[a]n ex parte interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as '[t]he covered entity receives satisfactory assurance . . . that reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of [45 CFR 164.512(e)(1)(v)].'" *Holman, supra* at 446, quoting 45 CFR 164.512(e)(1)(ii)(B).

Corp, 209 Mich App 287, 292-293 (1995). Accordingly, once the patient allows discovery of medical information, there are no grounds for restricting access to the patient's physician. *Davis, supra* at 293.

3.14 Police Officer as Witness

A. Lay Opinion Testimony

As with any lay witness, a police officer may be able to give opinion testimony under MRE 701.

1. Examples

- *Chastain v Gen Motors Corp* (*On Remand*), 254 Mich App 576, 588 (2002).

A police officer was permitted to give opinion testimony under MRE 701 that a plaintiff was not wearing a seat belt at the time of an automobile accident.

- *Miller v Hensley*, 244 Mich App 528, 531 (2001).

Two police officers' opinion testimony as to the cause of an accident was inadmissible where the officers did not see the accident and based their conclusions solely upon witness statements taken after the accident.

- *People v Oliver*, 170 Mich App 38, 50-51 (1988).

The court accepted opinion testimony from police officers that a car had been dented by bullets.

- *Heyler v Dixon*, 160 Mich App 130, 148-149 (1987).

Two police officers were permitted to give opinion testimony that the defendant was visibly intoxicated.

- *People v Smith (Jonathon)*, 152 Mich App 756, 764 (1986).

A police officer was permitted to give opinion testimony that the defendant was trying to conceal himself.

2. Jury Instruction

Police officers frequently appear as fact witnesses, which presents no special problems. However, in a criminal case, a

party may request the court to issue a jury instruction pursuant to CJI2d 5.11, which indicates that the police officer's testimony is to be judged by the same standards used to evaluate the testimony of any other lay witness.

B. Expert Testimony

Police officers are often asked to give expert testimony. The following are some of the topics on which expert testimony might be permitted from a police witness:

1. Blood Stain Interpretation

A police detective may be permitted to provide expert testimony regarding blood stain interpretation. *People v Haywood,* 209 Mich App 217, 224-225 (1995). In *Haywood*, the police officer "was clearly qualified by knowledge, experience, and training to testify regarding the bloodstains found in [the] defendant's apartment. He had received over one hundred hours of training in bloodstain analysis and attended five different seminars. Further, he had utilized that training in approximately one hundred previous cases. Finally, [the police officer] indicated that he was familiar with the literature on the subject and [taught] a course on bloodstain interpretation to other law enforcement officers." *Haywood, supra* at 225.

2. Delayed Disclosure

The Court of Appeals concluded that a detective possessed the requisite knowledge, training, experience, and education to be considered an expert capable of testifying about "delayed disclosure" in sex abuse victims. *People v Dobek*, 274 Mich App 58, 79 (2007).

3. Drug Dealing or Activity

Qualified police officers may testify as experts in controlled substance cases. *People v Murray*, 234 Mich App 46, 53 (1999). For an officer's expert testimony to be admissible, "'(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline.'" *Murray, supra* at 53, quoting *People v Williams (After Remand)*, 198 Mich App 537, 541 (1993).

Police expert testimony regarding drug profiles is admissible, but only to the extent that the testimony "does not move beyond an explanation of the typical characteristics of drug

dealing[.]" *Murray*, 234 Mich App at 54. A limiting instruction to the jury is appropriate. See *id.* at 60-61. CJI2d 4.17 provides such an instruction on the use of drug profile evidence.

4. Field Sobriety Tests

A police officer may testify as an expert about the results of a field sobriety test. *People v Peebles*, 216 Mich App 661, 667-668 (1996).

5. Firearms

A police expert in firearms identification has been allowed to testify that bullets came from the defendant's gun. *People v McPherson (Robert)*, 84 Mich App 81, 83 (1978) (dicta).

A police officer who had fired sawed-off shotguns was qualified as an expert to testify about their recoil characteristics. *People v Douglas*, 65 Mich App 107, 117 (1975).

6. Operation of Motor Vehicles

Because of the police officer's training and experience, he was qualified as an expert to testify about the defendant's estimated speed at the time of the accident. *People v Ebejer*, 66 Mich App 333, 340-343 (1976).

A police officer may give an expert opinion whether a tractor-trailer was properly loaded. *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 429-430 (1991).

3.15 Fingerprints

"Fingerprints are a matter of identification, not incrimination." *People v Cooper*, 220 Mich App 368, 375 (1996). The fingerprints themselves are the evidence, not the object on which they are found. *People v Cullens*, 55 Mich App 272, 274-275 (1974).

Provided they are properly authenticated under MRE 901, fingerprint cards bearing a defendant's fingerprints collected during an investigation at a time in which the defendant was not yet a suspect in the crime may be admissible as a business record or a public record under MRE 803(6) and MRE 803(8), respectively.[25] *People v Jambor (On Remand)*, 273 Mich App 477, 481-486 (2007).

[25] See Section 4.3(B)(6) on the business record hearsay exception, and Section 4.3(B)(7) on the public record hearsay exception.

Jury Instruction. CJI2d 4.15 should only be given where the sole evidence of identity comes from fingerprints.

> "Before a defendant may be convicted on the basis of fingerprint evidence, the people must prove that the prints correspond to those of the accused and were found in the place where the crime was committed under such circumstance that they could only have been impressed at the time when the crime was committed." Commentary to CJI2d 4.15.

3.16 Tracking Dog Evidence

A. Foundation

The prosecutor must lay a foundation in order for the court to admit tracking dog evidence. See *People v Norwood*, 70 Mich App 53, 55 (1976). In laying the foundation, the prosecutor must establish that the following conditions are present:

> "First, it is necessary to show that the handler is qualified to handle the dog. Second, it must be shown that the dog was trained and *accurate* in tracking humans. Third, it is necessary to show that the dog was placed on the trail where circumstances indicate that the culprit was. Fourth, it is necessary to show that the trail had not become stale when the tracking occurred." *Norwood*, 70 Mich App at 55 (internal citations omitted).

B. Use

Tracking dog evidence, standing alone, will not support a conviction, but is sufficient to justify the issuance of a search warrant. *People v Coleman*, 100 Mich App 587, 591-593 (1980).

C. Jury Instruction

When tracking dog evidence is used, the court must give CJI2d 4.14. CJI2d 4.14 is derived from *People v Perryman,* 89 Mich App 516, 524 (1979).

Chapter 4: Hearsay

4.1 Hearsay

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A hearsay statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). An assertion is something capable of being true or false. See *People v Jones (Alphonzo) (On Rehearing After Remand)*, 228 Mich App 191, 204-205 (1998) (concluding that a command is not an assertion because it is incapable of being true or false), rev'd in part on other grounds 458 Mich 862 (1998). Similarly, an "implied" assertion does not actually qualify as an assertion, and therefore, cannot be hearsay. *Jones (Alphonzo), supra* at 225-226.

Hearsay is not admissible except as provided by the rules of evidence. MRE 802. "[T]he basic objection to hearsay testimony is that if a witness offers an assertion made by a declarant who does not testify—and if the assertion is offered as evidence of the truth of the matter asserted—the trier of fact is deprived of the opportunity to evaluate the demeanor, responsiveness, and credibility of the declarant, particularly because the declarant cannot be tested by cross-examination." *People v Sykes*, 229 Mich App 254, 261-262 (1998).

Committee Tip:

In addressing a hearsay objection, the following analysis may be helpful:

• Is the proposed evidence a statement, as defined in MRE 801(a)?

• Was the statement made by someone other than the witness while testifying?

• Is the statement being offered to prove the truth of the matter asserted?

• If the proposed evidence is an out-of-court statement, is it admissible because (1) it is being offered for a nonhearsay purpose (i.e., not for the truth of the matter asserted); (2) it is not hearsay under MRE 801(d);[1] *or (3) it falls under an exception contained in MRE 803,*[2] *MRE 803A,*[3] *or MRE 804?*[4]

4.2 Nonhearsay

Some out-of-court statements are considered nonhearsay. MRE 801(d). Nonhearsay statements include prior statements of a testifying witness and admissions by party-opponents. MRE 801(d)(1)–MRE 801(d)(2). All of these statements are still subject to relevancy requirements.

"[MRE] 801(d) does not apply to statements that are not considered hearsay, such as direct testimony by witnesses[.]" *United States v Benson*, 591 F3d 491, 502 (CA 6, 2010) (the Court came to this conclusion under FRE 801(d)(2)(E), which is, in relevant part, identical to MRE 801(d)(2)(E)).

A. Prior Statement of Testifying Witness

A prior statement of a testifying witness is not precluded from being hearsay solely because the declarant and the witness are the same person. See MRE 801(c). See also *People v Jenkins*, 450 Mich 249, 256-257, 260-261 (1995), where the Court concluded that a prior inconsistent statement of a testifying witness was hearsay that was admissible solely for the purpose of impeaching the witness (although admission of the statement in the case at bar was error due to other issues that arose as a result of the statement's admission). However, if the statement falls under one of the categories listed in MRE 801(d)(1), it is considered nonhearsay. MRE

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[1] See Section 4.2 for a discussion of MRE 801(d).

[2] See Section 4.3(B) on MRE 803 hearsay exceptions.

[3] See Section 4.3(B) on the MRE 803A hearsay exception.

[4] See Section 4.3(B) on MRE 804 hearsay exceptions.

801(d)(1) states that "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

> "(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
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> "(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
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> "(C) one of identification of a person made after perceiving the person[.]"

1. Prior Inconsistent Statements[5]

For purposes of MRE 801(d)(1)(A), prior inconsistent statements are "'not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.'" *People v Chavies*, 234 Mich App 274, 282 (1999), overruled in part on other grounds *People v Cleveland Williams*, 475 Mich 245, 254 (2006), quoting *United States v Dennis*, 625 F2d 782, 795 (CA 8, 1980). Where a prior inconsistent statement is used for impeachment purposes, it "is not regarded as an exception to the hearsay rule because it is not offered as substantive evidence to prove the truth of the statement, but only to prove that the witness in fact made the statement." *Merrow v Bofferding*, 458 Mich 617, 631 (1998).

2. Prior Consistent Statements[6]

Four elements must be established before admitting a prior consistent statement: "'(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.'" *People v Jones (Valmarcus)*, 240 Mich App 704, 707 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999). The motive

[5] See Section 3.6(G) on impeaching a witness using prior inconsistent statements.

[6] See Section 3.6(F) on impeaching a witness using prior consistent statements.

mentioned in elements (2) and (4) must be the same motive. *Jones (Valmarcus), supra* at 712. Consistent statements made after the motive to fabricate arises constitute inadmissible hearsay. *People v McCray*, 245 Mich App 631, 642 (2001).

3. Prior Statement of Identification

MRE 801(d)(1)(C) requires the party seeking to introduce the evidence to show only that the witness is present and available for cross-examination. *People v Malone*, 445 Mich 369, 377 (1994). "[S]tatements of identification are not limited by whether the out-of-court declaration is denied or affirmed at trial. . . . As long as the statement is one of identification, [MRE] 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as nonhearsay, provided the witness is available for cross-examination." *Malone, supra* at 377. In addition, MRE 801(d)(1)(C) does not preclude out-of-court statements from a third party; the declarant is irrelevant. *Malone, supra* at 377-378. In *Malone*, a witness previously identified the defendant as the victim's shooter. *Id.* at 371-372. On the stand, the witness denied making the identification. *Id.* The trial court allowed an attorney and a police officer, both of whom were present at the prior identification, to testify that the witness had made the identification. *Id.* at 374. The Michigan Supreme Court concluded that this testimony was properly admitted as substantive evidence under MRE 801(d)(1)(C) because "the distinction between first- and third-party statements of prior identification does not limit substantive admissibility." *Malone, supra* at 390.

B. Admission by Party-Opponent

Statements that constitute admissions by party-opponents include:

> "(A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or
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> "(B) a statement of which the party has manifested an adoption or belief in its truth, or
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> "(C) a statement by a person authorized by the party to make a statement concerning the subject, or

> "(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
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> "(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MRE 801(d)(2).

The Michigan Supreme Court explained the rationale for admitting a party-opponent statement:

> "[T]he admissibility of a party-opponent statement springs from a sense of fundamental fairness captured in the phrase, 'You said it; you're stuck with it.' The hearsay rule operates to prevent a party from being 'stuck' with what *others* have said without an opportunity to challenge them directly before the trier of fact. However, there is no reason, given the adversarial nature of our system, to extend the rule's protection to a party's own statements." *Shields v Reddo*, 432 Mich 761, 775 (1989).

1. A Party's Adoption of Belief or Truth of Statement

Under MRE 801(d)(2)(B), "[a]dmission of evidence of a defendant's silence as a tacit admission of guilt is prohibited, unless the defendant has shown his adoption of or belief in the truth of the accusation." *People v Greenwood*, 209 Mich App 470, 473 (1995). In *Greenwood*, the defendant was charged with committing a larceny in a building. *Greenwood, supra* at 471. During the trial, a detective testified that the defendant was invited to come to the police station to give a formal interview, but never did. *Id.* at 472-473. In her closing argument, the prosecutor relied on this testimony to establish the defendant's guilt. *Id.* at 473. The Court of Appeals concluded that admitting the testimony was improper, and, thus the prosecutor should not have relied on it in her closing argument. *Id.* The Court stated that "there is no evidence that [the] defendant adopted or believed in the truth of the prosecutor's accusation that defendant remained silent and refused to come into the police station 'because he [committed the larceny].'" *Id.*

The Sixth Circuit explained the inquiry a court needs to make in deciding whether to admit an adoptive admission under FRE 801(d)(2)(B), which is identical to MRE 801(d)(2)(B):

> "When a statement is offered as an adoptive admission, the primary inquiry is whether the

> statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement." *Neuman v Rivers*, 125 F3d 315, 320 (CA 6, 1997).

In medical malpractice cases, an affidavit of merit constitutes a party admission under MRE 801(d)(2)(B). *Barnett v Hidalgo*, 478 Mich 151, 160-161 (2007). "[B]y filing the affidavit of merit with the court, [the] plaintiff manifests 'an adoption or belief in its truth[,]'" as required by MRE 801(d)(2)(B). *Barnett, supra* at 161.

2. Statements by Authorized Persons

It was proper for a trial court to admit a defendant's notice of alibi under MRE 801(d)(2)(C) to impeach the defendant where it was filed by the defendant's attorney, "who was a person authorized by [the] defendant to make a statement concerning the subject." *People v Von Everett*, 156 Mich App 615, 624-625 (1986).

In medical malpractice cases, an affidavit of merit constitutes a party admission under MRE 801(d)(2)(C). "An independent expert who is not withdrawn before trial is essentially authorized by the plaintiff to make statements regarding the subjects listed in MCL 600.2912d(1)(a)–MCL 600.2912d(1)(d). Therefore, consistent with the actual language of MRE 801(d)(2)(C), an affidavit of merit is 'a statement by a person authorized by the party to make a statement concerning the subject . . . .'" *Barnett*, 478 Mich at 162.

3. Statements by Agents or Employees

A party should be held "responsible for their choice of an agent or employee, and consequently for words spoken and actions taken by those they have chosen, during the period of time they choose to maintain the relationship." *Shields*, 432 Mich at 775. The Court noted that the statement must be made while the relationship still exists; statements made after the relationship is terminated are not admissible under MRE 801(d)(2)(D). *Shields, supra* at 775-776. In *Shields*, the plaintiff urged the Court to admit into evidence the deposition testimony of the defendant's former employee under MCR 2.308(A)(1)(b)[7] without making a showing of unavailability. *Shields, supra* at 764. The Court stated that "the deposition testimony of a person who was employed by a party at the

time of the occurrence out of which an action arose, but who was no longer employed by the party when the deposition was taken, is not admissible in evidence without a finding that the deponent is unavailable to testify at trial." *Shields, supra* at 785.

4. Coconspirator Statements

In order for a statement to be admissible under MRE 801(d)(2)(E), the proponent of the evidence must establish three things:

> (1) by a preponderance of the evidence and using independent evidence, a conspiracy existed;
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> (2) the statement was made during the course of the conspiracy; and
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> (3) the statement furthered the conspiracy. *People v Martin*, 271 Mich App 280, 316-317 (2006).

In order to establish that a conspiracy existed, the proponent may offer circumstantial or indirect evidence; direct proof of the conspiracy is not required to satisfy the first requirement. *Martin*, 271 Mich App at 317. In-court coconspirator testimony may be used to satisfy this requirement. *Benson*, 591 F3d at 501-502. In satisfying the second requirement, a "conspiracy continues 'until the common enterprise has been fully completed, abandoned, or terminated.'" *Martin, supra* at 317, quoting *People v Bushard*, 444 Mich 384, 394 (1993). Idle chatter will not show that a statement furthered a conspiracy under the third requirement. *Martin, supra* at 317. However, "statements that prompt the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective will suffice." *Id.*

In *Martin*, the defendant and his brother were charged with crimes arising out of their participation in the operation of an adult entertainment establishment. *Martin*, 271 Mich App at 285. At trial, Angela Martin, the ex-wife of the defendant's brother, testified about certain statements she heard her ex-husband make, including his admission that sex acts were occurring at the establishment and that he and the other participants financially benefitted from the illegal activities. *Id.* at 316. Angela further testified that she overheard a telephone conversation between the defendant and her ex-husband

[7] The Supreme Court amended MCR 2.308(A) at the end of this case "to eliminate the overlap and possibility of conflict between MCR 2.308(A) and the [rules of [e]vidence. *Shields, supra* at 786.

regarding "the VIP cards necessary to access the downstairs area where acts of prostitution occurred." *Id*. at 318. The defendant was convicted, and on appeal argued that Angela's testimony regarding his brother's statements was inadmissible hearsay. *Id*. at 316.

The Court of Appeals noted that trial testimony given before Angela's testimony provided evidence sufficient to raise an inference that the defendant and his brother conspired to carry out the illegal objectives of maintaining the establishment as a house of prostitution, accepting earnings of prostitutes, and engaging in a pattern of racketeering activity. *Martin*, 271 Mich App at 317-318. The Court further noted that because the conversation about the use of VIP cards clearly concerned the activities covered by the conspiracy, the statements were made in furtherance of the conspiracy. *Id*. at 318-319. Statements made to Angela regarding the financial compensation her ex-husband and the defendant earned from the establishment were also made in furtherance of the conspiracy because the statements informed Angela of her collective stake in the success of the conspiracy and served to foster the trust and cohesiveness necessary to keep Angela from interfering with the continued activities of the conspiracy. *Id*. at 319. Because the statements about which Angela testified satisfied the requirements in MRE 801(d)(2)(E), they were properly admitted against the defendant at trial. *Martin, supra* at 316-319.

4.3 Hearsay Exceptions[8]

Hearsay evidence may be admissible if it comes within an established exception. See MRE 802. There are many exceptions to the hearsay rule. This section only discusses the most common exceptions.

A. *Crawford* Issues

"By its straightforward terms, the Confrontation Clause directs inquiry into two questions: (1) Does the person in controversy compromise a 'witness against' the accused under the Confrontation Clause; and (2) if so, has the accused been afforded an opportunity to 'confront' that witness under the Confrontation Clause?" *People v Fackelman*, 489 Mich 515, 562 (2011).

Prior to 2004, testimonial hearsay evidence was admissible if it met traditional guarantees of reliability under the Michigan Rules of

[8] The residual exceptions (MRE 803(24) and MRE 804(b)(7)) are discussed together in Section 4.3(E).

Evidence. The United States Supreme Court created a new analysis in *Crawford v Washington*, 541 US 36, 68 (2004), holding that testimonial hearsay is not admissible against a criminal defendant unless the declarant is unavailable to testify at trial and the defendant had the opportunity to cross-examine the declarant.[9] Additionally, "the rules of evidence do not trump the Confrontation Clause." *Fackelman*, 489 Mich at 545. In *Fackelman,* the Michigan Supreme Court concluded that "the rules of evidence cannot override the Sixth Amendment and cannot be used to admit evidence that would otherwise implicate the Sixth Amendment." *Id*.

"[A] machine is not a witness in the constitutional sense and [] data automatically generated by a machine are accordingly nontestimonial in nature." *People v Dinardo*, 290 Mich App 280, 290-291 (2010). In *Dinardo,* the Court of Appeals approved the admissibility of an officer's DI-177 report "[b]ecause the breath-test results, printed on the [machine's report], were self-explanatory data produced entirely by a machine and not the out-of-court statements of a witness . . . ." *Dinardo, supra* at 291.

While the United States Supreme Court has not provided "a comprehensive definition of [the term] 'testimonial[,]'" it includes "at a minimum prior testimony at a preliminary hearing, before a grand jury, or at a former trial" and "police interrogations." *Crawford, supra* at 68.[10]

Crawford does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson (Lanier)*, 263 Mich App 124, 133 (2004). Thus, the admission of an unavailable witness's former testimonial statement is not barred by *Crawford* if the statement is admitted to impeach a witness. *McPherson (Lanier), supra* at 133-135. See also *People v Chambers*, 277 Mich App 1, 11 (2007), where the trial court properly admitted a police officer's testimony regarding a confidential informant's out-of-court identification of the defendant because the testimony was offered to explain how and why the defendant was arrested, not to prove the truth of the informant's tip.

Crawford does not bar the admission of an unavailable witness's testimonial statements where the defendant "'has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.'" *People v Jones (Kyle)*, 270 Mich App 208, 212-214 (2006), quoting MRE 804(b)(6). However,

[9] For a thorough discussion of *Crawford* and its progeny, see the Michigan Judicial Institute's *Circuit Court Benchbook: Criminal Proceedings,* Chapter 5.

[10] For a thorough discussion of what constitutes a testimonial statement, see the Michigan Judicial Institute's *Circuit Court Benchbook: Criminal Proceedings*, Chapter 5.

the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful act has caused a witness to be unavailable to testify at trial. *Giles v California*, 554 US 353 (2008). The doctrine of forfeiture by wrongdoing applies only when the witness's unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness's testimony. *Id*.

Under the "language conduit" rule, "an interpreter is considered an agent of the declarant, not an additional declarant, and the interpreter's statements are regarded as the statements of the declarant, without creating an additional layer of hearsay[;]" thus, where a defendant has a full opportunity to cross-examine the declarant, he or she has no additional constitutional right to confront the interpreter. *People v Jackson (Andre)*, ___ Mich App ___, ___ (2011). In *Jackson (Andre)*, *supra* at ___, a hospitalized shooting victim was questioned by a police officer. *Id*. at ___. Because the victim was unable to speak at the time of the interview, he answered the questions by either squeezing the hand of an attending nurse (to indicate "yes") or not (to indicate "no"). The Court stated that the following factors should be examined when determining whether statements made through an interpreter are admissible under the language conduit rule:

> "(1) whether actions taken subsequent to the conversation were consistent with the statements translated; (2) the interpreter's qualifications and language skill; (3) whether the interpreter had any motive to mislead or distort; and (4) which party supplied the interpreter." *Jackson (Andre)*, ___ Mich App at ___, citing *United States v Nazemian*, 948 F2d 522, 527-528 (CA 9, 1991), and *People v Gutierrez*, 916 P2d 598, 600-601 (Colo App, 1995).

Concluding that none of these factors militated against application of the language conduit rule, the Court held that although the victim's nonverbal answers qualified as testimonial statements, the defendant did not have a constitutional right to confront the nurse, "because what she reported was properly considered to be [the victim's] statements." *Jackson (Andre)*, ___ Mich App at ___. Because he "had a full opportunity to cross-examine" the victim, the defendant's Confrontation Clause rights were satisfied. *Id.* at ___.

B. MRE 803 Exceptions

Generally, MRE 803 does not require a declarant to be unavailable before the evidence will be admitted. However, under *Crawford*, 541 US 36,[11] any *testimonial* hearsay that is offered can only be admitted

upon a showing that the declarant is unavailable and was previously subject to cross-examination.

1. Present Sense Impression

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

> "**(1) Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1).

The Michigan Supreme Court requires three conditions to be satisfied before evidence may be admitted under the present sense impression exception. *People v Hendrickson*, 459 Mich 229, 235-236 (1998). In *Hendrickson*, the Court stated:

> "The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *Hendrickson*, 459 Mich at 236.

A slight lapse in time between the event and the description may still satisfy the *substantially contemporaneous* requirement. *Hendrickson*, 459 Mich at 236. In *Hendrickson*, the victim called 911 and explained that she had just been beaten by her husband. *Id.* at 232. The Court concluded that her phone call satisfied the *substantially contemporaneous* requirement because the victim's statement "was that the beating had just taken place" and "the defendant was in the process of leaving the house as the victim spoke." *Id.* at 237.

Corroboration (independent evidence of the event) is required. *Hendrickson*, 459 Mich at 237-238. In *Hendrickson*, the prosecution sought to introduce photographs of the victim's injuries as independent evidence of the beating. *Id.* at 233. The Court concluded that the photographs provided sufficient corroborating evidence of the event because the "photographs show[ed] the victim's injuries [and] were taken near the time the beating [was] alleged to have occurred. In addition, the

[11] See Section 4.3(A) on *Crawford v Washington*, 541 US 36 (2004).

injuries depicted in the photographs were consistent with the type of injuries sustained after a beating." *Id.* at 239.

2. Excited Utterance

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(2) Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2).

There are two requirements that must be met before a statement may be admitted as an excited utterance:

> (1) there must be a startling event, and
>
> (2) the statement must be made while still under the excitement caused by the startling event. *People v Smith (Larry)*, 456 Mich 543, 550 (1998).

The *Smith (Larry)* Court stated that "it is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Smith (Larry)*, 456 Mich at 551. Although the time between the event and the statement is an important factor to consider, it is not dispositive, and the court should determine if there is a good reason for a delay. *Id.* Some plausible reasons include shock, unconsciousness, or pain. *Id.* at 551-552. In *Smith (Larry)*, the victim was sexually assaulted and made a statement about the assault ten hours after it occurred. *Id.* at 548-549. The Court concluded that the statement was admissible as an excited utterance because the victim's uncharacteristic actions during the time between the event and the statement "describe[d] a continuing level of stress arising from the assault that precluded any possibility of fabrication." *Id.* at 552-553.

Admission of an excited utterance under MRE 803(2) "does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted. Rather, MRE 1101(b)(1) and MRE 104(a) instruct that when a trial court makes a determination under MRE 803(2) about the existence of a startling event or condition, the court may consider the out-of-court statement itself in concluding whether the

startling event or condition has been established." *People v Barrett*, 480 Mich 125, 139 (2008).

3. Then Existing Mental, Emotional, or Physical Condition

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." MRE 803(3).

a. State of Mind

Before a statement may be admitted under MRE 803(3), the court must conclude that the declarant's state of mind is relevant to the case. *Int'l Union UAW v Dorsey (On Remand)*, 273 Mich App 26, 36 (2006). For example, a "victim's state of mind is usually only relevant in homicide cases when self-defense, suicide, or accidental death are raised as defenses to the crime." *People v Smelley*, 285 Mich App 314, 325 (2009), vacated in part on other grounds 485 Mich 1019 (2010). In *Smelley* (a homicide case), the Court of Appeals concluded that the trial court abused its discretion in admitting statements that purported to show the victim's state of mind before he was killed because the victim's "state of mind was not a significant issue in this case and did not relate to any element of the crime charged or any asserted defense." *Smelley, supra* at 325.

Where the declarant states that he or she is afraid, the statement may be admissible to show the declarant's state of mind. *In re Utrera*, 281 Mich App 1, 18-19 (2008). In *In re Utrera*, the respondent appealed the trial court's order terminating her parental rights and argued that hearsay testimony was improperly admitted. *Utrera, supra* at 14. The Michigan Court of Appeals affirmed the trial court's decision to admit statements the declarant (a child) made to her therapist and to a guardianship investigator

regarding the fear the child felt towards her mother because these hearsay statements were relevant and pertained to the declarant's then-existing mental or emotional condition. *Id.* at 18-19.

b. Physical Condition

A declarant's statement that he or she is in pain from an accident may be admissible under MRE 803(3). *Duke v American Olean Tile Co*, 155 Mich App 555, 571 (1986). However, statements that describe the circumstances of the accident are not admissible under this rule. *Duke, supra* at 571. Similarly, statements about the declarant's symptoms may be admissible, but for purposes of MRE 803(3), it is irrelevant where the trauma occurred. *Cooley v Ford Motor Co*, 175 Mich App 199, 203-204 (1988).

4. Statements Made for Purposes of Medical Treatment or Diagnosis

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment.** Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." MRE 803(4).

"In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury. Traditionally, further supporting rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *People v Meeboer (After Remand)*, 439 Mich 310, 322 (1992).

Generally, statements of identification are not admissible under MRE 803(4) because "the identity of an assailant cannot be fairly characterized as the '*general cause*' of an injury." *People v LaLone*, 432 Mich 103, 111-113 (1989). In *LaLone*, the statement of identification was not admissible because it was not necessary to the declarant's *medical* diagnosis or treatment, and the statement was not sufficiently reliable because it was made to a psychologist, not a physician. *LaLone, supra* at 113-114. However, the *Meeboer* Court determined that statements of identification from a *child*-declarant alleging sexual abuse are "necessary to adequate medical diagnosis and treatment." *Meeboer*, 439 Mich at 322. Identification statements from a child allow the medical health care provider to (1) assess and treat any sexually transmitted diseases or potential pregnancy, (2) structure an appropriate examination in relation to the declarant's pain, (3) prescribe any necessary psychological treatment, and (4) know whether the child will be returning to an abusive home or will be given an opportunity to heal from the trauma. *Id.* at 328-329.

Where the declarant is a child, considering certain factors may be helpful in determining whether the child has a "self-interested motivation to speak the truth." See *Meeboer*, 439 Mich at 324-325, for a list of factors the court may consider.

5. Recorded Recollection

"The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(5) Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness'[s] memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." MRE 803(5).

In order to admit evidence pursuant to MRE 803(5), the following foundational requirements must be met:

> "'(1) The document must pertain to matters about which the declarant once had knowledge;

> "(2) The declarant must now have an insufficient recollection as to such matters; and
>
> "(3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his [or her] memory.'" *People v Daniels*, 192 Mich App 658, 667-668 (1992), quoting *People v J D Williams (After Remand)*, 117 Mich App 505, 508-509 (1982).

See also *People v Dinardo*, 290 Mich App 280, 288 (2010), where the Court of Appeals concluded that a DI-177 breath-test report is a hearsay document that may be admitted as a recorded recollection under MRE 803(5) if it satisfies the requirements in *Daniels*, 192 Mich App at 667-668. In *Dinardo*, the defendant was arrested for drunk driving and was tested for alcohol using a Datamaster machine. *Dinardo, supra* at 283. The officer testified that he wrote the results of the alcohol test on a DI-177 report at the time of the test, that he no longer recalled the specific results of the test, and that he did not have a copy of the original Datamaster ticket.[12] *Id.* at 283-284. The Court concluded that "the DI-177 report plainly satisfies all three requirements for admissibility [under MRE 803(5)]. [The officer] saw the Datamaster ticket and therefore had personal knowledge of the breath-test results at the time he recorded them onto the DI-177 report. Furthermore, [the officer] indicated that he no longer [had] any independent recollection of the specific results printed on the Datamaster ticket. Lastly, it is undisputed that [the officer] personally prepared the DI-177 report." *Dinardo, supra* at 293. Therefore, the officer was permitted to read the contents of the report into evidence at trial. *Id.* at 294.

According to *People v Missias*, 106 Mich App 549, 554 (1981):

> "MRE 803(5) does not require a showing that the witness was totally unable to recall the memorandum's contents, but only that the witness 'now has insufficient recollection to enable him [or her] to testify fully and accurately.'"

[12] "A Datamaster ticket apparently states the blood-alcohol percentage for each sample, the time when the testing procedure began (including the observation period before the test), and the exact time when each sample was taken and analyzed." *Dinardo*, 290 Mich App at 283 n1.

"Where it appears likely that the contents of a deposition will be read to the jury, the court should encourage the parties to prepare concise, written summaries of the depositions for reading at trial in lieu of the full deposition. Where a summary is prepared, the opposing party shall have the opportunity to object to its contents. Copies of the summaries should be provided to the jurors before they are read. MCR 2.512(F).

6. Records of Regularly Conducted Activity

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." MRE 803(6).

The Michigan Supreme Court summarized the business records hearsay exception as follows:

> "In order to ensure the same high degree of accuracy and reliability upon which the traditional, but narrowly construed business records exception was founded, the current rules also recognize that trustworthiness is the principal justification giving rise to the exception. Thus, FRE 803(6) and MRE 803(6) provide that trustworthiness is presumed, subject to rebuttal, when the party offering the evidence establishes the requisite foundation. Even though proffered

> evidence may meet the literal requirements of the rule, however, the presumption of trustworthiness is rebutted where 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'" *Solomon v Shuell*, 435 Mich 104, 125-126 (1990), quoting MRE 803(6).

If a party makes a timely objection, the court must determine whether the proffered evidence lacks trustworthiness. *Solomon*, 435 Mich at 126. If trustworthiness is lacking, the evidence cannot be admitted under MRE 803(6). See *Solomon*, *supra* at 126. "Trustworthiness . . . is an express condition of admissibility." *Id.* at 128. In *Solomon* (a wrongful death action), the defendant-police officers offered four police reports into evidence detailing a shooting that resulted in the death of the decedent. *Id.* at 108. The Michigan Supreme Court held that the circumstances under which the reports were generated clearly indicated a lack of trustworthiness because the defendants had an obvious motive to misrepresent the facts (they were under investigation for the death). *Id.* at 126-127.

Fingerprint cards may be admissible under MRE 803(6) as long as they are not prepared in anticipation of litigation. *People v Jambor (On Remand)*, 273 Mich App 477, 483-484 (2007). In *Jambor*, the Court concluded that fingerprint cards were admissible under MRE 803(6) because an adversarial relationship did not exist between the defendant and law enforcement at the time the fingerprint cards were prepared. *Jambor, supra* at 483-484. "[T]he fingerprint cards were prepared during the normal course of investigating a crime scene." *Id.* at 483.

7. Public Records

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> "**(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624."[13] MRE 803(8).

"[T]he principle justification for excepting public records from the hearsay rule is trustworthiness, which is generally ensured when records are prepared under circumstances providing an official duty to observe and report." *Solomon*, 435 Mich at 131. Where documents are prepared in anticipation of litigation or the preparer or source of information has a motive to misrepresent the information, they are not admissible under MRE 803(8) because they lack trustworthiness. *Solomon, supra* at 131-132.

In *Solomon* (a wrongful death action), the defendant-police officers offered four police reports into evidence detailing a shooting that resulted in the death of the decedent. *Solomon*, 435 Mich at 108. The Michigan Supreme Court held that the circumstances under which the reports were generated clearly indicated a lack of trustworthiness because the defendants had an obvious motive to misrepresent the facts (they were under investigation for the death). *Id.* at 132-133.

Police reports may be admissible under MRE 803(8), as long as they are not prepared in a setting that is adversarial to the defendant. *People v McDaniel*, 469 Mich 409, 413 (2003). "[A] laboratory report prepared by a nontestifying analyst 'is, without question, hearsay.'" *People v Payne*, 285 Mich App 181, 196 (2009), quoting *McDaniel, supra* at 412. In *McDaniel* (a drug case), a police laboratory report was inadmissible under MRE 803(8) because "[i]t was destined to establish the identity of the substance—an element of the crime for which [the] defendant was charged[.]" *McDaniel, supra* at 413.

C. MRE 803A Exception: Child's Statement[14] About Sexual Act

Although the common-law "tender years" exception to the hearsay rule did not survive the adoption of the original Michigan Rules of Evidence, it was reinstated with the adoption of MRE 803A. In criminal and delinquency proceedings only,[15] a child's statement regarding certain sexual acts involving the child is admissible, provided it corroborates the declarant's testimony during the same proceeding and:

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[13] "[S]cientific studies and research for the reduction of death, injury, and property losses" authorized by the office of highway safety planning "shall not be available for use in a court action[.]" MCL 257.624(1), (2).

[14] See Section 3.4 on child witnesses.

[15] See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A.

> "(1) the declarant was under the age of ten when the statement was made;
>
> "(2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> "(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> "(4) the statement is introduced through the testimony of someone other than the declarant." MRE 803A.

Generally, in order for a statement to be spontaneous under MRE 803A, "the declarant-victim [must] initiate the *subject of sexual abuse*." *People v Gursky*, 486 Mich 596, 613 (2010). Statements subject to analysis under MRE 803A fall into three groups: (1) purely impulsive statements (those that "come out of nowhere" or "out of the blue"); (2) non sequitur statements (those made as a result of prompt, plan, or questioning, but "are in some manner atypical, unexpected, or do not logically follow from the prompt"); and (3) statements made in answer to open-ended and nonleading questions but "include answers or information outside the scope of the questions" (these are the most likely to be nonspontaneous and require extra scrutiny). *Gursky, supra* at 610-612. To find spontaneity in statements falling into the third category of possible spontaneous statements, "the child must broach the subject of sexual abuse, [and] any questioning or prompts from adults must be nonleading and open-ended[.]" *Id.* at 626.

The Michigan Supreme Court emphasized that this holding does *not* automatically preclude a statement's admissibility under MRE 803A simply because the statement was made as a result of adult questioning. *Gursky, supra* at 614. "When questioning is involved, trial courts must look specifically at the questions posed in order to determine whether the questioning shaped, prompted, suggested, or otherwise implied the answers." *Id.* at 615. In *Gursky*, the facts of the case showed that (1) the victim did not initiate the subject of sexual abuse; (2) the victim "did not come forth with her statements on her own initiative, and thus that the statements were not necessarily products of her creation; and (3) the adult questioning the victim "specifically suggested defendant's name to [the victim.]" *Id.* at 616-617. Therefore, the Court

concluded that the victim's statements were not spontaneous and, thus, inadmissible under MRE 803A. *Gursky, supra* at 617.

The *Gursky* Court went on to stress that spontaneity is not the only factor a court must look at in order to determine the admissibility of a statement pursuant to MRE 803A; even after finding that a statement is spontaneous, the trial court "must nevertheless also conduct the separate analyses necessary to determine whether the statement meets the other independent requirements of MRE 803A." *Gursky, supra* at 615-616.

Only the declarant's first corroborative statement is admissible under MRE 803A. However, a statement that is inadmissible under MRE 803A because it is a subsequent corroborative statement, is not precluded from being admitted via another hearsay exception. *People v Katt*, 468 Mich 272, 294-297 (2003) (the statement was admissible under MRE 803(24)).

The proponent of the MRE 803A statement must notify the adverse party of his or her "intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement." MRE 803A.

D. MRE 804 Exceptions

Hearsay exceptions that apply only when the declarant is unavailable are set forth in MRE 804(b). A witness is "unavailable" when:

- the court exempts the declarant from testifying about his or her statement on the ground of privilege; or
- the declarant refuses to testify about his or her statement despite being ordered to do so; or
- the declarant cannot remember the subject matter of his or her statement; or
- the declarant cannot be present or testify due to death or current physical or mental condition; or
- the party offering the statement has not been able to procure the declarant's attendance at the hearing. MRE 804(a).

"A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

MRE 804(a)(1)–MRE 804(a)(5). A witness who abruptly leaves the courthouse before testifying may be "unavailable" for purposes of MRE 804(a)(2). *People v Adams*, 233 Mich App 652, 658-659 (1999). See also *People v Garland*, 286 Mich App 1, 7 (2009), where the trial court properly found that the victim was unavailable as defined in MRE 804(a)(4), where "the victim was experiencing a high-risk pregnancy, [] lived in Virginia, and [] was unable to fly or travel to Michigan to testify[.]"

~~The government made a sufficient showing of unavailability when it claimed that two witnesses were unavailable due to illness and presented a letter from the witnesses' doctor to the court that was "specific as to the nature of each [witness's illness and very clear in [the doctor's] opinion that the [witnesses'] health would be jeopardized if they were forced to testify at trial."[16] *United States v Gabrion*, ___ F3d ___, ___ (CA 6, 2011). "When the government is claiming unavailability due to illness, the specific inquiry must focus on both the severity and duration of the illness. The court must inquire as to the specific symptoms of the illness to determine whether the witness is physically able to come to the courthouse and testify, and the court must determine whether there is the probability that the illness will last long enough 'so that, with proper regard to the importance of the testimony, the trial cannot be postponed.'" *Gabrion, supra* at ___, quoting *Burns v Clusen*, 798 F2d 931, 937-938 (CA 7, 1986).~~

1. Former Testimony

"The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

> "(1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1).

The admission of prior testimonial statements violates a defendant's constitutional right to confrontation unless the prior statements were subject to cross-examination by the

[16] ~~The Court went on to state that because the defendant had an opportunity to cross-examine each of these witnesses at their depositions, and there was a sufficient showing of unavailability, there was no Confrontation Clause violation. *Gabrion*, ___ F3d at ___.~~

defendant, and the person who made the statements is unavailable to testify. *Crawford*, 541 US at 68.[17]

For former testimony to be admissible under MRE 804(b)(1), two requirements must be met: (1) the proffered testimony must have been made at "another hearing," and (2) the party against whom the testimony is offered must have had an opportunity and similar motive to develop the testimony. *People v Farquharson*, 274 Mich App 268, 272, 275 (2007). See also MRE 804(b)(1). In *Farquharson*, the Court concluded that an investigative subpoena hearing is similar to a grand jury proceeding and thus, constitutes "another hearing" under MRE 804(b)(1). *Farquharson, supra* at 272-275. "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony is presented at each proceeding." *Id.* at 275. The Court adopted a nonexhaustive list of factors that courts should use in determining whether a similar motive exists under MRE 804(b)(1):

> "(1) whether the party opposing the testimony 'had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue';
>
> "(2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and
>
> "(3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities)." *Farquharson*, 274 Mich App at 278.

2. Dying Declaration

"The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

> "(2) *Statement Under Belief of Impending Death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the

[17] See Section 4.3(A) on admissibility under *Crawford, supra*.

> declarant believed to be impending death." MRE 804(b)(2).

MRE 804(b)(2) permits the admissibility of statements made by a declarant at a time when the declarant believed his or her death was imminent. The rule does not require that the declarant actually die in order for the statements to be admissible; the declarant needs only to have believed that his or her death was imminent. *People v Orr*, 275 Mich App 587, 594-596 (2007).

"A declarant's age alone does not preclude the admission of a dying declaration." *People v Stamper*, 480 Mich 1, 5 (2007). In *Stamper*, the declarant was a four-year-old child who stated that he was dead and identified the defendant as the person who inflicted his fatal injuries. *Stamper, supra* at 3. The Court affirmed admission of the child's statement, rejecting the defendant's argument that a four-year-old could not be aware of impending death. *Id.* at 5.

3. Statement Against Proprietary Interest

"The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

> "(3) *Statement Against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." MRE 804(b)(3).

A declarant's statement that he shared ownership of a strip of land with the plaintiffs was admissible as a statement against proprietary interest. *Sackett v Atyeo*, 217 Mich App 676, 684 (1996). In *Sackett*, the defendants purchased a home owned by the declarant and his wife who had always maintained a shared driveway with their neighbors, the plaintiffs. *Sackett, supra* at 677-679. Based on a survey conducted before the defendants bought the property that said they owned the

entire driveway, the defendants erected a fence along their property line, which encompassed the driveway. *Id.* at 679-680. The plaintiffs filed an action to quiet title to half of the driveway and based their suit on the theory of acquiescence. *Id.* at 680. The plaintiff-husband testified that the former owner (who had subsequently died) told him that no matter what the survey indicated, the plaintiffs owned half of the driveway. *Id.* at 678, 684. The Court concluded that this statement was admissible under MRE 804(b)(3) because the declarant's "statement was contrary to his proprietary interest in his property because the statement was a statement against his ownership interest in a portion of his property. A reasonable person would not make such a statement unless he believed it to be true." *Sackett, supra* at 684.

Statements made against a declarant's proprietary interest are not required to be supported by corroborating evidence. *Davidson v Bugbee*, 227 Mich App 264, 267 (1997). The Court stated:

> "By enacting MRE 804(b)(3), the Supreme Court specifically provided that statements against *criminal interests* that are offered to exculpate the accused must be supported by corroborating evidence. The Court did not apply any such restriction on the admission of statements against *proprietary interests* in a civil case, regardless of the circumstances under which the statement was made." *Davidson, supra* at 267 (emphasis added).

4. Statement Against Penal Interest

"The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

> "(3) *Statement Against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating

> circumstances clearly indicate the trustworthiness of the statement." MRE 804(b)(3).

Providing a hearsay exception for statements against penal interests is premised "on the assumption that people do not generally make statements about themselves that are damaging unless they are true." *People v Washington*, 468 Mich 667, 671 (2003). Where the statement is testimonial,[18] the Confrontation Clause is implicated. *Crawford*, 541 US 36. However, the admissibility of a *nontestimonial* statement is governed solely by MRE 804(b)(3) because it does not implicate the Confrontation Clause. *People v Taylor (Eric)*, 482 Mich 368, 374 (2008). See, e.g., *United States v Johnson (Earl)*, 581 F3d 320, 326 (CA 6, 2009), where a nontestifying codefendant's tape-recorded statements were properly admitted under FRE 804(b)(3) (MRE 804(b)(3) uses the same language as the federal rule of evidence) because the statements were not testimonial but were statements against penal interest for purposes of FRE 804(b)(3). "For a statement to be admitted under the hearsay exception for statements against penal interest set forth in Rule 804(b)(3), the declarant must be unavailable, the statements must, 'from the perspective of the average, reasonable person,' be adverse to the declarant's penal interest, and corroborating circumstances must 'truly establish the trustworthiness of the statement.'" *Johnson (Earl), supra* at 326.

A statement that one intends to commit a crime is inadmissible under MRE 804(b)(3). *People v Brownridge*, 225 Mich App 291, 303-304 (1997), rev'd in part on other grounds 459 Mich 456 (1999). In *Brownridge*, the statements were made before the alleged offense was committed, and thus, were not against the declarant's penal interest. *Brownridge, supra* at 304.[19] "'The declaration must be against one's pecuniary interest *at the time the statement is made* or it fails to qualify as an exception to the hearsay rule.'" *Id.* at 304, quoting *Merritt v Chonowski*, 58 Ill App 3d 192 (1978).

a. Inculpatory Statements

> "[W]here . . . the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative

[18] For a thorough discussion on what constitutes a testimonial statement under *Crawford*, see the Michigan Judicial Institute's *Circuit Court Benchbook: Criminal Proceedings*, Chapter 5.

[19] On remand, the Court of Appeals found that admitting the statement was harmless error because it was admissible as a statement of the declarant's then existing state of mental, emotional, or physical condition under MRE 803(3). *People v Brownridge (On Remand)*, 237 Mich App 210, 216-217 (1999).

> without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)." *People v Poole*, 444 Mich 151, 161 (1993), overruled on other grounds by *Taylor (Eric)*, 482 Mich 368.

In *Taylor (Eric)*, the declarant made two nontestimonial statements during two separate telephone calls: the first statement implicated himself, the defendant, and another individual named King; the second statement only implicated King. *Taylor (Eric)*, 482 Mich at 379-380. Relying on the Court of Appeals holding, the Michigan Supreme Court concluded that the two statements were admissible as statements against penal interest because they were "'a pattern of impugning communications' volunteered spontaneously and without reservation to a friend, not delivered to police, and 'without any apparent secondary motivation other than the desire to maintain the benefits of the relationship's confidence and trust—and according to the record, to brag'"—and constituted a *narrative of events* as required by *Poole, supra*, and MRE 804(b)(3). *Taylor (Eric)*, 482 Mich at 380.

b. Exculpatory Statements

"A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." MRE 804(b)(3). According to the Michigan Supreme Court:

> "[T]he defendant's constitutional right to present exculpatory evidence in his [or her] defense and the rationale and purpose underlying MRE 804(b)(3) of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship: the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission. . . . In contrast, the more remote or tangential a statement is to the defense theory, the more likely other factors can be interjected to weigh against admission of the statement."

> *People v Barrera*, 451 Mich 261, 279-280 (1996) (internal citations omitted).

In order to determine whether the declarant's exculpatory statement was actually against his or her penal interest, "the statement [must] be probative of an element of a crime in a trial against the declarant, and . . . a reasonable person in the declarant's position would have realized the statement's incriminating element." *Barrera,* 451 Mich at 272. In *Barrera*, the declarant stated that he was not promised anything in return for his statement and was advised of his *Miranda*[20] rights before giving the statement. *Id.* at 281. The Court concluded that any reasonable person in the declarant's position "would have realized that any admissions by him could implicate him in a crime." *Id.*

In order to determine if the statement was sufficiently corroborated by other evidence, the *Barrera* Court adopted the totality of the circumstances test enumerated in *Poole*, 444 Mich at 165. The *Poole* Court stated:

> "[T]he presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> "On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth." *Poole, supra* at 165.[21]

[20] *Miranda v Arizona*, 384 US 436 (1966).

The *Barrera* Court further indicated that an additional inquiry must be made when a statement is made to the authorities while the declarant is in custody. *Barrera*, 451 Mich at 276. The Court stated:

> "With respect to custodial statements, we find useful the three-factor inquiry developed by the United States Court of Appeals for the Seventh Circuit. *United States v Garcia*, 986 F2d at 1140 [(1993)]. Under that test, the court should first consider 'the relationship between the confessing party and the exculpated party and . . . [whether] it was likely that the confessor was fabricating his story for the benefit of a friend. Thus, if the two involved parties do not have a close relationship, one important corroborating circumstance exists.' *Id.* (citation omitted). The second factor is 'whether the confessor made a voluntary statement after being advised of his *Miranda* rights.' *United States v Nagib*, 56 F3d 798, 805 (CA 7, 1995), citing *Garcia*, 986 F2d at 1140. The third is 'whether there is any evidence that the statement was made in order to curry favor with authorities.' *Id.*" *Barrera, supra* at 275.

In *Barrera*, the Michigan Supreme Court found that the statement in question was critical to the defendant's defense theory, and "his constitutional right to present [the exculpatory evidence] limited the threshold of corroborating circumstances that the court could require of [the declarant's] statement." *Barrera*, 451 Mich at 289. Additionally, the Court found that applying the three-factor analysis for custodial statements "further corroborated the trustworthiness of [the declarant's] statement." *Id.* Specifically, the declarant did not have a close relationship with the defendant, the declarant made a voluntary statement after being given his *Miranda* rights, and there was no evidence that he gave the statement to curry favor with the authorities. *Id.* at 289-290.

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[21] *People v Taylor (Eric)*, 482 Mich 368 (2008), overruled *Poole, supra,* to the extent that *Poole* applied these factors to its confrontation analysis because *Crawford v Washington*, 541 US 36 (2004), had been decided and had become the new standard in confrontation issue analysis. However, it does not appear that the Michigan Supreme Court intended to overrule the use of these factors in analyzing issues other than confrontation.

The court has discretion whether to admit an exculpatory statement under MRE 804(b)(3). *Barrera*, 451 Mich at 269. "In exercising its discretion, the trial court must conscientiously consider the relationship between MRE 804(b)(3) and a defendant's constitutional due process right to present exculpatory evidence." *Barrera, supra* at 269.

c. Cautionary Instruction

Where the statement against interest involves accomplice testimony, the trial court has discretion whether to give a cautionary instruction[22] on accomplice testimony. *People v Young*, 472 Mich 130, 135 (2005). The court may give the instruction no matter who calls the witness. *People v Heikkinen*, 250 Mich App 322, 331 (2002). In *Heikkinen* (an aggravated assault case), the defendant's son testified that the defendant acted in self-defense. *Heikkinen, supra* at 324. The trial court instructed the jury under CJI2d 5.5 (witness is a disputed accomplice) and CJI2d 5.6 (accomplice testimony). *Heikkinen, supra* at 325-326. The Court concluded that these instructions may be warranted in cases where the defendant offers potential exculpatory accomplice testimony; the instructions are not limited to inculpatory accomplice testimony. *Id.* at 327-337. The instructions were appropriate in *Heikkinen* because, under the facts of the case, the son's testimony was "inevitably suspect." *Id.* at 337-338.

A cautionary instruction should not be given regarding accomplice testimony when the testimony is from a codefendant in a joint trial, and the codefendant would be prejudiced by the instruction. See *People v Reed*, 453 Mich 685, 687 (1996). In *Reed*, the codefendant in a joint trial took the stand in his own defense; the defendant's attorney failed to request a cautionary instruction on accomplice testimony, and the trial court did not issue an instruction sua sponte. *Reed, supra* at 686-690. The Michigan Supreme Court concluded that giving such an instruction would have constituted an error requiring reversal because it would have asked the jury to view the codefendant's testimony suspiciously, thereby prejudicing his defense. *Id.* at 693-694.

[22] See CJI2d 5.6.

E. Residual Exceptions

The Michigan Supreme Court explained the purpose behind the residual hearsay exceptions (MRE 804(b)(7) and MRE 803(24)):

> "The residual exceptions are designed to be used as safety valves in the hearsay rules. They will allow evidence to be admitted that is not 'specifically covered' by any of the categorical hearsay exceptions under circumstances dictated by the rules. Differing interpretations of the words 'specifically covered' have sparked the current debate over the admissibility of evidence that is factually similar to a categorical hearsay exception, but not admissible under it." *People v Katt*, 468 Mich 272, 281 (2003).[23]

The *Katt* Court rejected the "near miss" theory, which precludes the admission of evidence under a residual hearsay exception when the evidence "was inadmissible under, but related to, a categorical exception." *Katt*, 468 Mich at 282-286. Under the *near miss* theory, "[e]vidence is 'specifically covered' if there is a categorical hearsay exception dealing with the same subject matter or type of evidence." *Id.* at 282. In rejecting the *near miss* theory, the Court concluded that "a hearsay statement is 'specifically covered' by another exception for purposes of MRE 803(24) only when it is admissible under that exception." *Katt, supra* at 286. The Court emphasized that "residual hearsay must reach the same quantum of reliability as categorical hearsay" before it can be admitted under the residual exception. *Id*. at 290.

Evidence offered under MRE 803(24) must meet four requirements. *Katt*, 468 Mich at 290. "[A] hearsay statement must:

> "(1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions,
>
> "(2) be relevant to a material fact,
>
> "(3) be the most probative evidence of that fact reasonably available, and
>
> "(4) serve the interests of justice by its admission." *Katt, supra* at 290.

In determining equivalent trustworthiness, the court must look at the totality of the circumstances. *Katt*, 468 Mich at 290-291.

[23] The *Katt* Court analyzed the evidence under MRE 803(24). However, MRE 803(24) contains language identical to MRE 804(b)(7). The only difference is that MRE 804(b)(7) requires the declarant to be unavailable. See *People v Welch*, 226 Mich App 461, 464 n 2 (1997).

Although no list of factors exist for making this determination, the court should consider anything relevant to the statement's reliability except for "corroborative evidence . . . in criminal cases if the declarant does not testify at trial." *Id.* at 292, citing *Idaho v Wright*, 497 US 805 (1990).

In *Katt*, a child victim made statements to a social worker that she was sexually abused by the defendant. *Katt*, 468 Mich at 273. These statements were not admissible under MRE 803A, but were properly admitted under MRE 803(24). *Katt*, *supra* at 273-274. The Court concluded:

> "The spontaneity of the interview, lack of motive to lie, and [the social worker's] interviewing methods combine[d] to give the statement circumstantial guarantees of trustworthiness equivalent to the categorical exceptions. The unavailability of [the victim's] first statement, the timing of the interview, and [the social worker's] careful conduct in eliciting information make this statement the most probative evidence of defendant's abusive acts. Having found that [the victim's] statement met the first three requirements of MRE 803(24), the [trial] court [properly] concluded that admission would not endanger the interests of justice and ruled the statement admissible." *Katt, supra* at 296.

F. Statements Narrating, Describing, or Explaining the Infliction or Threat of Physical Injury

MCL 768.27c establishes an exception to the hearsay rule for statements purporting to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. This exception applies only to cases involving domestic violence. A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

> "(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> "(b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> "(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

> "(d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> "(e) The statement was made to a law enforcement officer." MCL 768.27c(1).

MCL 768.27c(1)(a) "places a factual limitation on the admissibility of statements[,]" and MCL 768.27c(1)(c) "places a temporal limitation on admissibility." *People v Meissner*, ___ Mich App ___, ___ (2011). Together, these provisions "direct that a hearsay statement can be admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury." *Meissner, supra* at ___. In *Meissner*, the victim gave a verbal statement and prepared a written statement for the police that she had been threatened by the defendant (1) on previous occasions, (2) that morning at her home, and (3) again that same day, via text message, after telling the defendant she had contacted the police. *Id.* at ___. The Court of Appeals found that "[t]he [trial] court could . . . determine that [the victim's] statements met [MCL 768.27a](1)(a) because the statements described text messages that threatened physical injury, and met [MCL 768.27c](1)(c) because [the victim] made the statements at or very near the time she received one or more of the threatening text messages." *Meissner, supra* at ___.

For purposes of MCL 768.27c(1)(d), "circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

> "(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
>
> "(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> "(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section." MCL 768.27c(2).

MCL 768.27c(2) expressly states that the court is not limited to the listed factors when determining "circumstances relevant to the issue of trustworthiness;" the listed factors are merely "a non-exclusive list of possible circumstances that may demonstrate trustworthiness." *Meissner*, ___ Mich App at ___.

The reference in MCL 768.27c(2)(a) to statements made in contemplation of "pending or anticipated litigation" "pertains to litigation in which the declarant could gain a property, financial, or similar advantage, such as divorce, child custody, or tort litigation."

Meissner, ___ Mich App at ___. In cases where the declarant is an alleged victim of domestic violence, that provision "does not pertain to the victim's report of the charged offense." *Id.*

For purposes of MCL 768.27c, the phrase "'[d]omestic violence' or 'offense involving domestic violence' means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

> "(*i*) Causing or attempting to cause physical or mental harm to a family or household member.[24]
>
> "(*ii*) Placing a family or household member in fear of physical or mental harm.
>
> "(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> "(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27c(5)(b).

MCL 768.27c(3) requires the prosecuting attorney to disclose evidence admissible under the statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

4.4 Negative Evidence

A. Generally

"Negative evidence is evidence to the effect that a circumstance or fact was not perceived or that it was, or is, unknown. It is generally of no probative value and, hence, inadmissible. However, a negative response to a question does not necessarily constitute negative evidence." *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810 (1979) (internal citations omitted). Negative evidence is problematic because it presents two conflicting inferences: (1) the event never occurred, or (2) the event occurred but the witness did not perceive it. *Dalton v Grand Trunk W R Co*, 350 Mich 479, 485 (1957). The *Dalton* Court went on to state that "[t]he mere fact of [nonperceiving], standing alone, ordinarily has no probative value whatever as to the

[24] "Family or household member" is defined in MCL 768.27c(5)(c).

occurrence, or nonoccurrence, of the event." *Dalton, supra* at 485. As an example, the Court cited the bombing of Pearl Harbor: most people did not hear the bombing, but that does not mean the bombing did not occur. *Id.* at 485-486. Therefore, the party relying on the evidence bears the burden of proving its probative value:

> "[The party] must show the circumstances pertaining to the nonobservance, the witness'[s] activities at the time, the focus of his [or her] attention, his [or her] acuity or sensitivity to the occurrence involved, his [or her] geographical location, the condition of his [or her] faculties, in short, all those physical and mental attributes bearing upon his [or her] alertness or attentiveness at the time.
>
> * * *
>
> "[T]he weight to be accorded the testimony of a witness, his [or her] credibility, whether or not his [or her] testimony is affirmative and convincing, rests with the jury." *Dalton*, 350 Mich at 486.

B. Absence of Record or Entry

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> * * *
>
> "(7) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) [(records of regularly conducted activity)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
>
> * * *
>
> "(10) To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902 [(self-authentication)], or

testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry." MRE 803(7), MRE 803(10).

C. Examples

- *Beasley v Grand Trunk W R Co*, 90 Mich App 576 (1979) (a train accident case).

"[M]ere testimony that a sound was not heard, by itself, does not present an issue of fact as to whether or not the sound existed. Such 'negative evidence' must be preceded by a showing that the witness had been in a position to hear the sound if it occurred." *Beasley*, 90 Mich App at 584 (internal citation omitted). In *Beasley*, six witnesses testified that they did not hear a train whistle or any other warning device. *Id*. One of the witnesses was "positive" that the train did not blow its whistle. *Id.* at 585. In light of these facts, the Court concluded that the evidence was admissible as a question of fact for the jury to decide. *Id.* 585-586.

- *Larned v Vanderlinde*, 165 Mich 464 (1911) (a slip and fall case).

Testimony that the location where the plaintiff fell had been used for years without accident was inadmissible as negative evidence because proving an absence of accidents does not tend to prove an absence of negligence. *Larned*, 165 Mich at 468.

Chapter 5: Exhibits

5.1 Receipt, Custody, and Return of Exhibits

The management of exhibits is addressed in Component 20 of the Michigan Trial Court Case File Management Standards.[1] MCR 2.518(A). For purposes of the Case File Management Standards (CFMS), "exhibits" are defined as "evidence introduced at or during court proceedings to support litigation, not exhibits and other discovery materials attached to pleadings and other documents filed with the court." CFMS, Component 20 (rev 2/11), p 33. Exhibits are not part of the case file. *Id.* at p 34. "If a report or other document is nonpublic, its introduction into evidence as an exhibit does not make it public."*Id.*

Each court is responsible for developing its own set of guidelines for receiving, maintaining, and returning or disposing of exhibits. See CFMS, Component 20 (rev 2/11). However, the Standards require the individual assigned by the court to receive exhibits to maintain an exhibit log that easily identifies the exhibit with the appropriate case. Exhibit logs should not be returned to the parties after trial. The court is also responsible for:

- ensuring that all exhibits are secured during trial, including keeping a log of who takes what exhibit from the courtroom during trial; and guarding/securing narcotics, weapons, money, and valuable or sensitive materials during court recesses and lunch hours, and

[1] See http://courts.michigan.gov/scao/resources/standards/cf_stds.pdf.

- keeping admitted exhibits separate from exhibits that are either rejected or being withheld from the jury. CFMS, Component 20 (rev 2/11), pp 33-34.

After trial, most exhibits should be retrieved by the party that submitted them. However, if the exhibit is a weapon, drugs, or other relevant item, it must be returned to the confiscating agency. The parties have 56 days to retrieve their exhibits; if they do not retrieve their exhibits within this time frame, the court may dispose of the exhibits without notice to the parties. MCR 2.518(B); CFMS, Component 20 (rev 2/11), p 34.

5.2 Chain of Custody

A. Foundation

An adequate foundation for the admission of proffered tangible evidence must contain verification that the object was involved in the matter at hand and that the object is in substantially the same condition as when it was seized. *People v Prast (On Rehearing)*, 114 Mich App 469, 490 (1982). In evaluating the foundation presented, the trial court should consider the nature of the object, the circumstances surrounding the preservation and custody of the object, and the possibility of an individual tampering with the object while it is in custody. *Prast, supra* at 490.

B. Break in the Chain of Custody

A court is not required to automatically exclude proffered evidence because of a break in the chain of custody of the evidence. *People v Herndon*, 246 Mich App 371, 405 n 76 (2001), citing *People v Jennings*, 118 Mich App 318, 322 (1982). "[T]he prosecution [must] show[] that the article is what it is purported to be and show[] that it is connected with the crime or the accused." *Prast*, 114 Mich App at 490.

A break in the chain of custody of the object affects the weight of the evidence, not its admissibility. *People v Ramsey*, 89 Mich App 260, 267 (1979). It is not an abuse of discretion to admit evidence where there are alleged deficiencies concerning the collection and preservation of the evidence as long as there is no missing vital link in the chain of custody or there is no sign of tampering with the evidence. See *Jennings*, 118 Mich App at 324.

5.3 Demonstrative Evidence

> "Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case. The demonstrative evidence must be relevant and probative. Further, when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event." *People v Bulmer*, 256 Mich App 33, 35 (2003) (internal citations omitted).

If the evidence bears a "substantial similarity" to an issue of fact in the case, it may be admissible. *Lopez v General Motors Corp*, 224 Mich App 618, 627-634 (1997). "The burden . . . is on the party presenting the evidence to satisfy the court that the necessary similar conditions exist." *Duke v American Olean Tile Co*, 155 Mich App 555, 561 (1986). In *Lopez* (an automobile accident case), the trial court did not abuse its discretion in admitting two videotapes that depicted crash tests with conditions similar to, but not exactly, like those of the accident at issue. *Lopez, supra* at 620, 625, 634-635.

The Court of Appeals noted the difference between re-creation evidence and demonstrative evidence and when each type of evidence is appropriate. *Lopez,* 224 Mich App at 628 n 13. The Court stated:

> "[T]he distinction between demonstrative evidence and re-creation evidence, and the standards of admission associated with each, is important. When evidence is offered to show how an event occurred, the focus is upon the conditions surrounding that event. Consequently, it is appropriate that those conditions be faithfully replicated. By contrast, when the evidence is being offered not to re-create a specific event, but as an aid to illustrate an expert's testimony concerning issues associated with the event, then there need not be as exacting a replication of the circumstances of the event." *Lopez, supra* at 628 n 13 (1997), citing *Green v Gen Motors Corp*, 104 Mich App 447, 449-450 (1981) (internal citations omitted).

5.4 Best Evidence Rule[2]

A. Requirement of Original

"To prove the content of a writing, recording, or photograph,[3] the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." MRE 1002.

"'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." MRE 1001(1).

"An 'original' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An 'original' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" MRE 1001(3).

B. Photographs

For purposes of the best evidence rule and its exceptions, "'[p]hotographs' include still photographs, X-ray films, video tapes, and motion pictures." MRE 1001(2).

As with all evidence, the trial court has discretion to admit or exclude photographs. *People v Mills*, 450 Mich 61, 76 (1995).

> "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness'[s] testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Mills*, 450 Mich at 76 (internal citations omitted).

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[2] Because MRE 1002 is commonly referred to as the "Best Evidence Rule" in most Michigan courts, this benchbook will also refer to the court rule as such. However, the common name is misleading and frequently misunderstood. "[T]here is no hierarchy of evidence in Michigan and the best evidence rule only requires that the 'original' document be produced." *Baker v Gen Motors Corp*, 420 Mich 463, 509 (1984). Additionally, in order for the best evidence rule to apply, the contents of the evidence must be at issue. *People v Lueth*, 253 Mich App 670, 686 (2002).

[3] See Section 5.4(B) on photographs.

In *Mills*, the victim was intentionally set on fire by the defendants, and the prosecution sought to introduce color slides depicting the extent of the victim's injuries. *Mills*, 450 Mich at 63, 66. The Michigan Supreme Court found that the photographs were relevant under MRE 401 because they "affect[ed] two material facts: (1) elements of the crime, and (2) the credibility of witnesses." *Mills, supra* at 69. Additionally, the probative value of the slides was not substantially outweighed by unfair prejudice because, despite their graphic nature, they were an "accurate factual representation[] of the [victim's] injuries" and they "did not present an enhanced or altered representation of the injuries." *Id.* at 77-78.

In order to lay a proper foundation for the admission of photographs, "someone who is familiar from personal observation of the scene or person photographed [must] testif[y] that the photograph is an accurate representation of the scene or person. Photographs are admissible despite changes in the condition of the scene or person where a person testifies as to the extent of the changes." *In re Robinson*, 180 Mich App 454, 460-461 (1989) (internal citations omitted). In *Robinson* (a murder case), the defendant challenged the admission of photographs taken twenty days after the victim died and after the victim had been embalmed and buried, because they did not accurately depict the victim at the time of death. *Robinson, supra* at 460. The Court of Appeals concluded that admission was proper because testimony established that, although the photographs did not depict the victim at the time of death, the trauma the victim suffered was more likely to show after being embalmed and the photos *did* depict the victim at the time of the autopsy. *Id*. at 461.

C. Exceptions

MREs 1003–MRE 1007 provide exceptions to the best evidence rule. However, because no published case law exists on MRE 1005 (public records) and MRE 1007 (testimony or written admission of a party), the rules themselves are quoted for reference purposes.[4]

1. Admissibility of Duplicates

MRE 1003 permits the admission of duplicates, unless (1) there are genuine questions of the original's authenticity or, (2) admitting a duplicate would be unfair. "A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or

[4] See Section 5.4(C)(3) and Section 5.4(C)(5).

electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original." MRE 1001(4).

Admitting a true *copy* of a defendant's default judgment of divorce, for purposes of deciding whether to bind him over, "was not inherently unfair . . . because it only served to establish that [the] defendant was ordered to pay child support, a fact that [the] defendant [did] not contest." *People v Monaco*, 262 Mich App 596, 609 (2004), rev'd in part on other grounds 474 Mich 48 (2006).

2. Admissibility of Other Evidence of Contents

MRE 1004 does not require the original. "[O]ther evidence of the contents of a writing, recording, or photograph is admissible if[:]"

- the originals are lost or destroyed, "unless the proponent lost or destroyed them in bad faith"; or
- the originals are not obtainable by any judicial process or procedure; or
- the originals are in the possession of the party against whom they are being offered, and after receiving notice of the proponent's intent to use the originals as a subject of proof, the possessing party does not produce them at the hearing; or
- "[t]he writing, recording, or photograph is not closely related to a controlling issue."

Where the defendant was charged with CSC-I, and testimony established that the defendant looked at child pornography on his computer before and during the sexual assaults, it was proper to admit photographs from his computer that were similar to, but not exactly like, those that the defendant looked at during the assaults. *People v Girard*, 269 Mich App 15, 18-19 (2005). In Girard, the defendant argued that admission of the images violated the best evidence rule because witnesses identified the images only "as being similar to the images they had seen on [the] defendant's computer." Girard, supra at 19. According to the Court, testimony about the computer images explained the circumstances under which the sexual assaults occurred, and therefore, with regard to the CSC-I charges against the defendant, the images of child pornography found on the defendant's computer were a collateral matter unrelated to a controlling issue. Id. at 20. Therefore, the similar

photographs were properly admitted against the defendant pursuant to MRE 1004(4). Girard, supra at 20.

3. Public Records

MRE 1005 states:

> "The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902[5] or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given."

4. Charts, Diagrams, and Summaries

MRE 1006 permits the admission of charts, summaries, and calculations to summarize "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court[.]" "The court may order that [the originals or duplicates] be produced in court." *Id.* To be admissible, four requirements must be satisfied:

- The evidence must summarize a voluminous amount of material, which cannot conveniently be examined in court;
- The underlying materials must be admissible;
- "'[T]he originals or duplicates of the underlying materials must be made available for examination or copying by the other parties, at a reasonable time and place'"; and
- The "'summary must be an *accurate* summarization of the underlying materials.'" *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 100 (1995), quoting *White Industries v Cessna Aircraft Co*, 611 F Supp 1049, 1070 (WD MO, 1985).

[5] MRE 902 concerns self-authentication.

5. Testimony or Written Admissions of Party

MRE 1007 states:

> "Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission without accounting for the nonproduction of the original."

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